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THE

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(CANADA)

AND

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TABLE OF THE NAMES OF CASES

REPORTED IN

VOLUME VII. OF THE WESTERN LAW REPORTER (CANADA).

(NOVEMBER, 1907—MARCH, 1908.)

A.

Addison v. Dickson (Alta.), 291.
Allman v. Yukon Consolidated Gold Fields Co. (Y.T.), 318.
Anglo-American Lumber Co. v. McLelland (B.C.), 422.
Anticknap v. City of Regina (Sask.), 163.
Armstrong and St. Eugene Consolidated Mining Co., Re (B.C.), 374.

B.

Bagshawe v. Rowland (B.C.), 158.
Baker, Re (Sask.), 69.
Bank of Montreal v. Thompson (B.C.), 144.
Bannerman v. Barlow (Sask.), 859.
Barnard, Re (Alta.), 624.
Barrette v. Canadian Bank of Commerce and Syndicat Lyonnais Du Klondike (Y.T.), 659.
Beere v. Northern Bank (Alta.), 432.
Bell Liquor Appeal, Re (B.C.), 250.
Bennett v. C ——— (Man.), 740.
Bennetto and City of Winnipeg, Re (Man.), 561.
Bird v. Canadian Pacific R. W. Co. (Sask.), 868.
Bishopric v. York (Alta.), 206.
Blain v. Britannia Smelting Co. (B.C.), 368.
Bole v. Roe (B.C.), 160.
Braatz v. White Whale Lake School District No. 746 (Alta.), 164.
Brett v. Foorsen (Man.), 13.
Brock v. Royal Lumber Co. (Man.), 247.
Broley v. Mills (Sask.), 655.
Brotherton and City of Medicine Hat, Re (Alta.), 187.
Bryce v. Canadian Pacific R. W. Co. (B.C.), 143.
Burlington Canning Co. v. Campbell (Man.), 544.

C.

Cable v. Socotra (Exchequer Court of Canada), 25.
Cameron v. Suttles (Y.T.), 686.
Cameron v. Winnipeg Electric R. W. Co. (Man.), 698.
Canada Elevator Co. v. Kaminski (Man.), 129.
Canada Law Book Co. v. A. B. (Man.), 363.
Canadian Bank of Commerce v. Donoghue (Y.T.), 511.
Canadian Bank of Commerce v. Wait (Alta.), 255.
Canadian Northern R. W. Co. and Robinson, Re (Man.), 593.
Castleman v. Waghorn (B.C.), 412.
Clayton v. Canadian Northern R. W. Co. (Man.), 721.
Clinton v. Sellars (Alta.), 615.
Cortese v. Canadian Pacific R. W. Co. (B.C.), 392.
Cotter v. Osborne (Man.), 90.
Couse v. Banfield (Man.), 19.
Craftsmen v. Hunter (Sask.), 837.
Crawford v. Patterson (Alta.), 183.
Cyr v. O'Flynn (Sask.), 452.

D.

Davis v. Butler (Man.), 85.
Davison v. Schwartz (Y.T.), 338.
Dayman v. Macdonald (Sask.), 296.
Deering v. Gibbon (Alta.), 178.
Delagorgendiere v. Acaster (Sask.), 467.
De Laval Separator Co. v. Walworth (B.C.), 395.
Diebert v. Diebert (Sask.), 458.
Douglas v. Fraser (Man.), 584.
Duck v. Daniels (B.C.), 770.
Duggan v. Corbett (Y.T.), 693.
Dunn v. Sedziak (Man.), 563.
Dupuis, Re (Man.), 699.

E.

Easton v. Anderson (Alta.), 282
Edmonton, City of, v. Macdonald (Alta.), 201.
Ellis, W. P., & Co., Re (B.C.), 371.
Elvin v. Clough (Man.), 762.
Emperor of Russia v. Prospouriakoff (Man.), 766.
Esquimalt and Nanaimo R. W. Co. v. Fiddick (B.C.), 778.

F.

Falk v. Swensen (B.C.), 376.
Fensom v. Bulman (Man.), 134.
Fisher v. Jukes (Man.), 731.
Foulds v. Bowler (Man.), 517.
Fowler v. Barnard (Alta.), 624.
Fraser v. Canadian Pacific R. W. Co. (Man.), 734.
Freeze v. Carey (Alta.), 287.
Fry v. Town of Indian Head (Sask.), 293.
Fuller v. Hunker Mercantile Co. (Y.T.), 80.

G.

Gardner v. Gorman (Alta.), 630.
Gesman v. City of Regina (Sask.), 307.
Gilby v. Johnston (Sask.), 493.
Gillies v. Gibson (Man.), 243.
Goode v. City of Edmonton (Alta.), 608.
Gordon v. Leary (Man.), 533.
Grand Lodge of Knights of Pythias v. Great Northern R. W. Co. (B.C.), 425.
Great West Implement Co. v. Grams (Alta.), 190.
Great West Lumber Co. v. Wilkins (Alta.), 166.
Grimes v. Gauthier (Sask.), 485.
Grobb v. Darling (Man.), 97.

H.

H. W. Laird Co. v. Adams (Sask.), 312, 881.
Haffner v. Cordingley (Man.), 764.
Halliday v. Vincent (Man.), 7.
Hannah v. Graham (Man.), 554.
Harrison v. Carberry Elevator Co. (Man.), 535.
Harvie, Re (Man.), 103.
Hill v. Barwis (Alta.), 428.
Hind, Re (Sask.), 806.
Hofins v. Lenora Mount Sicker Copper Mining Co. (B.C.), 156.
Hopkins v. Danroth (Sask.), 303.
Horner v. Stevenson (Alta.), 794.
Huggard v. Ontario and Saskatchewan Land Corporation (Sask.), 489.

I.

Ideal Furnishing Co., Re (Man.), 558.
Imperial Life Assurance Co. of Canada v. Best (Alta.), 446.
International Coal and Coke Co. v. Trelle (Alta.), 264.

J.

Jackson v. Canadian Pacific R. W. Co. (Sask.), 828.
Jenns v. Oppenheimer (B.C.), 774.
Johansen v. Elliott (B.C.), 785.
Jones and Moore Electric Co. of Manitoba, Re (Man.), 527.
Jull v. Rasbach (B.C.), 404.

K.

Keating and Olsen, Re (Y.T.), 316.
Kelly v. Kelly (Man.), 542.
Kew v. Watt (Sask.), 62.
Kirkland v. Brown (B.C.), 786.

L.

Lachance v. Wilson (Sask.), 646.
Laird, H. W., Co. v. Adams (Sask.), 312, 881.
Leib v. Leib (Sask.), 824.
Leibrock v. Adams (Man.), 700.
Levelle v. Lannic (Alta.), 281.
Litchfield v. Saskatchewan and Battle River Land and Development Co. (Sask.), 475.
Logan v. Ward (Alta.), 198.
Loiselle and Town of Red Deer, Re (Alta.), 42.
Lougheed v. Hamilton (Alta.), 204.

M.

McCauley v. Powell (Alta.), 443.
McDonald v. Lawlor (Sask.), 639.
McInsley v. Gilley (B.C.), 22.
McKay v. Carey (Alta.), 287.
McLean v. Dove (B.C.), 365.
Maclennan Re (Y.T.), 209.
McLorg v. Loppe (Sask.), 833.
McLorg v. Stanning (Man.), 701.
Maloney v. Whitlock (Sask.), 460.
Mansell v. Moore (Sask.), 808.
Mathieson v. Murphy (Sask.), 479.
Milestone Land and Loan Agency Co. v. Lucksinger (Sask.), 497.
Miller and American-Abell Engine and Threshing Co. and Webster, Re (Sask.), 839.
Milner v. Marriot (Alta.), 793.
Mills v. Bryce (Man.), 738.
Mills v. Magrath (Alta.), 74.
Miniota Lumber and Grain Co. v. Foley (Sask.), 482.
Mitchell v. City of Winnipeg (Man.), 120.
Montgomery v. Mitchell (Man.), 518.
Moore v. Macrae (Y.T.), 215.
Moore v. Shackleford (Y.T.), 930.
Morden Woollen Mills Co. v. Heckles (Man.), 715.
Morris Provincial Election, Re (Man.), 132, 233.
Morrow and Lindsay, Re (Sask.), 48.
Mund v. Busch (Sask.), 305.
Munro v. Gillie (B.C.), 253.
Murray v. Canadian Pacific R. W. Co. (Sask.), 50.
Myers v. Tytler (B.C.), 416.

N.

National Trust Co. v. Campbell (Man.), 754.
New Hamburg Manufacturing Co. v. Weisbrod (Sask.), 8[illegible].
Newlands v. Higgins (Alta.), 59.
North-Western Construction Co. v. Young (B.C.), 397.
Novak v. Abrahams (Y.T.), 222.

O.

O'Flynn v. Carson (Sask.), 463.

P.

Paget v. Bennett (Man.), 11.
Park v. Long (Sask.), 309.
Parkin v. Parkin (Sask.), 66
Patrick v. Patrick (Sask.), 470.
Patton v. Pioneer Navigation and Sand Co. (Man.), 744.
Peters v. Perras (Alta.), 193.
Ponton v. City of Winnipeg (Man.), 702.
Prince v. Richards (Sask.), 836.
Purdy v. Colton (Sask.), 820.
Purmal v. Town of Medicine Hat (Alta.), 437.

R.

Bear v. Imperial Bank of Canada (B.C.), 408.
Red Deer Mill and Elevator Co., Re (Alta.), 284.
Regina Trading Co. v. Godwin (Sask.), 651.
Reilander v. Bengert (Sask.), 891.
Revillon Brothers Limited v. Derome (Alta.), 53.
Rex v. Choney (Man.), 537.
Rex v. Code (Sask.), 814.
Rex v. Dunning (Sask.), 857.
Rex v. Edwards (Man.), 1.
Rex v. Feihne (Sask.), 501
Rex v. Four Chinamen (B.C.), 146.
Rex v. Gage (Man.), 564.
Rex v. Garvin (B.C.) 783.
Rex v. McEwen (Man.), 364.
Rex v. McHugh (B.C.), 252.
Rex v. Mercier (Y.T.), 922.
Rex v. Misse (Y.T.), 934.
Rex v. Narain (B.C.), 781.
Rex v. Picard (Man.), 241.
Rex v. Pickard (Alta.), 797.
Rex v. Sala (Y.T.), 336
Rex v. Smith (Man.), 92.
Rex v. Williamson (Sask.), 490, 501.
Reynolds v. McPhalen (B.C.), 380.
Riddell, Re (Sask.), 301.
Robertson v. Carstens (Man.), 742.
Robert Ward & Co. Limited v. Wilson (B.C.), 37.
Rosen v. Lindsay (Man.), 115.
Ross v. Gorman (Alta.), 630.
Roueche, Re (Alta.), 278.
Russia, Emperor of, v. Prospouriakoff (Man.), 766.

S

Sack v. Construction Co. (Sask.), 653.
Saskatchewan and Battle River Land and Development Co. v. Hunter (Sask.), 298.
Sawyer-Massey Co. and Dennis, Re (Alta.), 272.
Schatsky v. Bateman (Man.), 526.
Schuchard v. Drinkle (Sask.), 844.
Schurman v. Ewing and Moore (Alta.), 610.
Shore v. Hewson (Sask.), 634.
Short v. Graham (Alta.), 787.
Simon v. Sinclair (Man.), 410.
Simpson, Re (B.C.), 36.
Smythe v. Mills (Man.), 557.
Speers v. McAfee (Alta.), 275.
Star Mining Co. v. Byron N. White Co. (B.C.), 147.
Steele v. McCarthy (Sask.), 902.
Steele v. Pritchard (Man.), 108.
Stevenson v. Smith (B.C.), 161.
Stewart v. McMahon (Sask.), 643.
Stewart-McDonald Co.'s Case (Man.), 558.
Still v. Watson (Sask.), 466.
Stratford Mill Building Co.'s Claim (Alta.), 284.

T.

"Tartar," The, v. The "Charmer" (B.C.), 417.
Taylor v. City of Revelstoke (B.C.), 39.
Tellier v. Schilemans (Man.), 229.
Theo Noel Co. v. Vitæ Ore Co. (Man.), 353.
Thordarson v. Heale (Man.), 106.
Thordarson v. Jones (Man.), 106.
Tirschmann v. Schultz (Man.), 525.
Tudge Pork Packing Co., *Re* (Sask.), 507.

U.

Union Trust Co. v. Duplat (Sask.), 459.

V.

Vancouver, Victoria, and Eastern R. W. Co. and Milsted, *Re* (B.C.), 384.
Victoria Municipal Voters' Lists, *Re* (B.C.), 372.
Vogan v. Barry (Sask.), 811.
Vopni v. Stephenson (Man.), 753.
Vosper v. Aubert (Man.), 758.
W. P. Ellis & Co., *Re* (B.C.), 371.

W.

W. P. Ellis & Co., Re (B.C.), 371.
Walsh v. Herman (B.C.), 388.
Ward v. Logan (Alta.), 198.
Watts v. Watts (B.C.), 29.
Watts & Co. v. Mohler (Alta.),), 627.
Wedin v. Robertson (Alta.), 72.
Weir and City of Calgary, *Re* (Alta), 45.
Westaway v. Hamer (Sask.), 473.
White v. Edgar (Alta.), 634, 800.
Williams v. Hamilton (B.C.), 40.
Willoughby v. Conover (Man.), 87.
Win Gat v. Johnson (Sask.), 637.
Winterburn Farm Co. v. Edmonton, Yukon, and Pacific R. W. Co. (Alta.), 801.
Wolfe v. McArthur (Man.), 124.
Woodward v. Kosowan (Alta.), 632.

Y.

Yasne v. Kronson (Man.), 119.
Yates v. Reser (Sask.), 848.
York v. Secord (Alta.), 448.

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VOL. VII. TORONTO, JANUARY 15, 1908. No. 1.

MANITOBA.

OCTOBER 8TH, 1907.

COURT OF APPEAL.

REX v. EDWARDS.

Criminal Law—Summary Trial of Prisoner on Charge of Theft—Sentence Imposed by Police Magistrate—Admission by Prisoner of Previous Conviction—Letters before Magistrate—Sentence Based on Fact of Previous Conviction—Reduction by Court of Appeal—Criminal Code.

The prisoner was brought before the police magistrate for the city of Winnipeg on an information which charged him with theft. He consented to be tried before the magistrate summarily, pleaded guilty, and was remanded for sentence. Before sentence was passed the magistrate had handed to him a letter from the chief constable of Toronto to the chief of police of Winnipeg, which stated that the prisoner was believed to be the same person who was convicted in 1902 on a charge of obtaining money by fraud and sentenced to one year in the Central prison. Before sentencing the prisoner the magistrate asked him, "Prisoner, have you been previously convicted of theft?" He replied, "I have." The magistrate then sentenced the prisoner to 10 years, being 7 years, the maximum for theft, and three years on account of previous conviction.

Subsequently, G. A. Stewart Potts (R. A. Bonnar with him) applied to the Court of Appeal (RICHARDS, PERDUE,

and PHIPPEN, JJ.A.), to set aside the sentence passed by the magistrate and to pronounce a proper sentence. The application was made under sec. 1016 of the Criminal Code, sub-sec. 2, which is as follows: "If the sentence is alleged to be one which could not by law be passed, either party may without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence."

The question was raised whether the prisoner should be present during the proceedings, and the Court decided that he need not be, as there was only a question of law to be argued. If the Court thought fit to impose a sentence different from that already imposed, then the presence of the prisoner would be necessary.

G. Patterson, for the Crown.

THE COURT, after some discussion, decided that it was its duty to deal with the case and state what the proper sentence should be, and at a later date judgment was given.

RICHARDS, J.A.:—In this matter I have arrived at a conclusion with much hesitation. The forms used before a magistrate are intended for preliminary inquiry only, and till long after they were fixed by statute were not forms that could be used on the trial of indictable offences under any circumstances. In a preliminary inquiry prior convictions are not in question. They are only of importance after a trial that has resulted in a conviction.

Where a party, on being brought before a magistrate who has power to try an indictable offence, chooses to be tried by the magistrate for such an offence, no indictment is drawn. The magistrate tries the prisoner on the information already laid for the purposes of the preliminary inquiry, as a Court would ordinarily try it on an indictment. When the police magistrates were given such power to try indictable offences, no provision was made by the Code for any change in the forms, so as to permit of charges of previous conviction being made part of the record, as they may be in cases where the trial is on an indictment.

Where a person is charged on an indictment, it is provided by sec. 851 of the Code that previous convictions may be alleged on the face of the indictment. Sections

963 and 982 provide a procedure for charging the accused in such cases with these former convictions, when so alleged on the face of the indictment, and for proving them if it should become necessary to do so.

As regards proceedings by indictment, I take it to be definitely the intention of Parliament, as shewn by the above sections of the Code, that the alleging of former convictions on the face of the indictment is a condition precedent to charging the accused with them.

It may be that it was intended that the need for alleging former convictions on the record, where it is intended to charge the accused with them, should only apply to proceedings by indictment. At any rate there is no provision in the Code for alleging them on the record, or for proving them, when a person brought before a magistrate for a preliminary inquiry as to an indictable offence elects to be tried by such magistrate. For the above reason, a magistrate is placed in a doubtful position with regard to his power of considering previous convictions when such an election is made. If he cannot, after convicting a person for the offence for which he is trying him, refer to, and have proved before him, previous convictions against that person, then his power of dealing with the case is not so great in all respects as the power of a Court where the trial is had on an indictment.

On the other hand, the particularity of the above quoted sections of the Code and the care they shew in providing that the accused and his counsel shall know that he is to be charged with them, and that the accused shall be protected from any mistake as to his identity with other persons previously convicted, or as to the existence of such previous convictions, prove such an intention on the part of Parliament to require those provisions, as it is difficult to find an intention to dispense with them on trials before a magistrate.

It is a rule of administration of criminal law that the rights of an accused person shall be carefully protected. Where such rights are as above so fully safeguarded in the case of a trial upon an indictment, I cannot see my way, in the absence of express legislation, to hold that those safeguards are meant to be dispensed with on a trial by a magistrate.

Courts jealously scrutinize provisions respecting the liberty of the subject. For that reason it seems to me that, in deciding whether previous convictions may or may not be considered in a trial before a magistrate, we should give the accused the benefit of the doubt, and hold that they may not, in a case like the present, where there is no reference on the record to any previous conviction.

Whether, if the previous conviction in question herein had been alleged on the face of the information, the magistrate could have taken that conviction into consideration, we are not called on now to consider.

I think that the learned magistrate exceeded his powers in imposing a sentence for a term greater than that allowed when no former conviction has been proved, and that, under sub-sec. 2 of sec. 1016 of the Code it is the duty of this Court to sentence the accused.

PERDUE, J.A.:—I agree that the appeal must be allowed. I would like to say, in the first place, that I have very great confidence in Mr. Daly, the police magistrate. He has had much experience as a magistrate, and I have great respect for his decisions. I think, however, that he has erred in the view he has taken of this case. If the sentence he pronounced had not exceeded the limit allowed by the Code, the matter could never have been brought before this Court. He exceeded this limit in imposing the sentence he did, and for that reason this Court must now pass the sentence it considers proper.

It appears to me improper for a Judge or magistrate to ask a prisoner questions with a view of obtaining an answer which may justify the Judge or magistrate in passing a more severe sentence than he would upon a first offender. Under our criminal laws, as is well known, an accused person cannot be called upon to answer any question which would incriminate him, unless he voluntarily make himself a witness in his own behalf. I think it is wrong for a magistrate who is about to pass sentence on a prisoner to ask him a question with a view of extorting a confession that he has been previously convicted, so that the prisoner might thereby receive several years' additional punishment. From certain documents which have been produced, it appears that a letter was received from the chief of police at Toronto referring to a previous con-

viction of the accused in this case. There were also several anonymous letters referring to the accused, making charges against and commenting severely upon him. I think that the magistrate should not have asked the questions he did in reference to the previous conviction.

For the offence with which the accused was charged the sentence was excessive. Persons found guilty of offences equally grave as that to which he had pleaded guilty, are often, upon a first conviction, given only a few months in gaol. It is desirable that there should be something in the nature of uniformity in imposing sentences in cases where the offences are the same and the circumstances are not materially dissimilar, without, of course, interfering with the discretion of the Judge under the statute.

In deference to the opinion of the police magistrate, who seemed to think that the accused should be sent to the penitentiary, I would send him there, but I would make the term the shortest that can be imposed in case of imprisonment in the penitentiary.

PHIPPEN, J.A.:—I have very little to add to the remarks of my brother Judges.

If it is deemed desirable to inflict the special punishment provided for previous offenders by sec. 386, sub-sec. 2, of the Code, it is, in my opinion, necessary to strictly follow the provisions of the Code applicable thereto. Unless the previous conviction be charged as provided in sec. 851, the punishment authorized by sub-sec. 2 of sec. 386 cannot be imposed. This course was not followed, and the sentence is, therefore, illegal. If it be said there is no provision for charging a previous conviction before a magistrate, then, in my judgment, the magistrate has no authority to inflict the additional term of punishment; but I am inclined to think under sub-sec. 16 of sec. 2 of the Code "indictment" in sec. 851 includes information, and that a previous conviction could be properly charged. The sentence should, therefore, be set aside as one which could not by law be passed: sec. 1016, sub-sec. 2.

The question has been raised before us as to how far a Judge or magistrate in dealing with a convicted person may take ex parte statements or make private inquiries into the prisoner's past life. A prisoner pleads guilty to a crime charged. The Judge may sentence him anything,

say, from a year in gaol to 20 years in the penitentiary. How is he to determine what sentence will best serve the ends of justice if he knows nothing beyond the statement in the formal indictment and the plea admitting guilt? Punishment for crime is not intended merely as punishment to the accused. It is to prevent, rather than to avenge, crime. The well-being of the prisoner as well as the wrong he has committed and the interests of the public must all be considered, and a just conclusion cannot be reached in ignorance of the prisoner's past and of the circumstances of the offence.

It is impossible to lay down any hard and fast rule on this subject. The Judge or magistrate must, in each case, exercise his best discretion, and in so doing should, I think, be careful not to take into consideration matters which might unjustly incline him against the accused, dealing with the prisoner as a person of previous good character, rather than incurring the possibility of a mistake to his prejudice.

Generally speaking, the prisoner's public manner of life and occupation is fair subject for consideration, but I would hestitate before paying any attention to anonymous letters or private statements of supposed particular acts of crime which have not been made the subject of judicial investigation, and for which, if guilty, the prisoner might be separately punished. From the return which the magistrate has made to the Court in this case, it would appear that some such matters may have possibly influenced him in the sentence he imposed, and it is only because of this that I feel justified in disregarding, so entirely, his conclusions and in passing a sentence in such variance with his judgment. This magistrate has had much greater experience than I in dealing with criminals, and in the matter of punishment I would ordinarily, without hesitation, accept his views in preference to my own.

The prisoner was, at a later date, brought into Court and a sentence of 2 years' imprisonment was imposed upon him, in lieu of the sentence which had been pronounced by the police magistrate.

MANITOBA.

MACDONALD, J. NOVEMBER 4TH, 1907.

TRIAL.

HALLIDAY v. VINCENT.

Vendor and Purchaser—Contract for Sale of Land—Payment by Instalments—Default—Assignment of Contract by Purchasers—Payment by Assignee—Agreement as to Re-assignment—Consent of Vendors—Refusal to Give—Breach of Condition—Specific Performance.

Action for specific performance.

G. R. Coldwell, K.C., and H. E. Henderson, for plaintiffs.

J. E. O'Conner and H. P. Blackwood, for defendants.

MACDONALD, J.:—On 28th April, 1906, the plaintiff Halliday purchased from the defendants certain lands in township 10 and range 20 west in the province of Manitoba, together with certain chattels, for the price of $39,560. Under the terms of the agreement, which is filed as exhibit 1, $2,000 was to be paid on the execution of the agreement, or within 30 days thereafter, during which time the agreement was to be held as an escrow, and if the sum of $2,000 was not paid, the said agreement should, at the option of the vendors, be absolutely null and void; the balance of the purchase price and interest was to be paid by the delivery of certain portions of the crop of grain grown upon the said lands in each and every year thereafter, the proceeds derived from the sale of such grain to be applied by the vendor, first in payment of interest, and the surplus in reduction of the purchase price.

The plaintiff Halliday entered upon the lands and took possession of the chattels and proceeded with the cultivation of the lands. On 24th May, 1906, the defendant George W. Vincent interviewed the plaintiff Halliday about the payment of the $2,000. When the latter told him he feared he could not pay him, Vincent stated that he must have the farm back, unless payment made when due. The sale of the farm to Halliday was negotiated through one

Williamson, a real estate agent, and it was through him that the plaintiff Ross was brought into the transaction. Finding that he could not meet the $2,000 payment, the plaintiff Halliday, it is evident, consulted Williamson, after which the latter called upon the plaintiff Ross and induced him to advance Halliday the $2,000, the latter to obtain a bonus of $500, and Halliday to give as security an assignment of his interest in the property purchased from the defendants, and in furtherance of this arrangement the agreement exhibit 2 was executed.

This agreement provides that, upon payment of the money so advanced by the plaintiff Ross to his co-plaintiff, together with interest, and the further sum of $500, by way of bonus and interest to the date of payment, at any time on or before 1st October, 1907, the defendants would consent to a re-assignment from the plaintiff Ross to his co-plaintiff.

From the time of the execution of the agreement (exhibit 2), the plaintiff Ross was to all intents and purposes in possession. The defendant George W. Vincent in his evidence says: "I got the $2,000 on date of this assignment; Halliday was in possession at the time; plaintiff Ross went into possession at the time of the execution of the agreement (exhibit 2), for all purposes of the agreement." The plaintiff Halliday remained on the place, looking after the farm work, until 20th July, 1906, on which date he left, with the then intention of abandoning the farm and his rights under the agreement

The plaintiff Ross then entered into actual possession and took charge of the farm and all the work connected with it; he did not himself live on the place, but his men did.

Not wishing to be burdened with the working of the farm, or with the ownership of it, and as he never intended having anything to do with it except as a security for the moneys he had advanced his co-plaintiff, together with the bonus of $500, the plaintiff Ross wrote the defendant Vincent wishing to be released from his liability and made offers of settlement, but Vincent would not entertain any proposition by which Ross would be released. Ross then conceived the idea of seeking out his co-plaintiff Halliday and inducing him to come back and take over the farm, and succeeded in so doing by offering to re-assign

the agreement and forgive him his liability of $2,500, expecting thereby to escape any further liability to the defendants under the assignment (exhibit 2).

The defendants were requested, in pursuance of their agreement, to consent to the re-assignment to Halliday, and this they declined to do—hence this action.

The defendants refuse to consent to the re-assignment, on the ground that Halliday had not complied with the terms, conditions, and covenants of his agreement, and that his not doing so entitled the plaintiffs to declare the agreement unenforceable in so far as Halliday's rights are concerned.

Halliday was in actual personal possession until he left on 20th July; the defendants admit that they knew the plaintiff Ross was in possession "for all the purposes of the agreement" from and after the date of the assignment from Halliday to him; they cannot, therefore, reasonably assert that, because Halliday was not in actual personal possession, there was a breach disentitling him to the benefits of the agreement. The other breaches which are asserted by the defendants as a ground of refusal to consent to a re-assignment, are equally untenable. They are, to my mind, of too trifling a character to justify serious consideration; furthermore, they were mostly committed prior to the date of the assignment from Halliday to Ross, to which the defendants assented, and I cannot understand how they can now claim the benefit of any default on the part of Halliday prior to that date. The only ground, to my mind, upon which the defendants can seriously question the right of the plaintiff Halliday to a re-assignment of the agreement exhibit 1, is because of the non-payment of the $2,500 by Halliday to Ross provided for in the assignment exhibit 2, and upon the payment of which the defendants, according to the terms of that assignment, agreed to consent to such re-assignment, and the plaintiff Ross would thereafter be free from further liability.

The plaintiff Ross agreed with Halliday to a re-assignment, without any consideration other than taking the place off his hands by a re-assignment of the agreement, and to release him from all liability for his indebtedness under the assignment exhibit 2, but upon consulting a solicitor it was deemed advisable to go through a form of payment by which the said indebtedness should be actually paid in

money, and the defendants led to believe that Halliday had paid Ross the money.

I find that no money passed between Halliday and Ross, and that the manner of giving it the appearance of payment was simply a device to lead the defendants to believe that it was a bona fide payment in money, and it is on this conduct of the parties that counsel for the defendants lays the most stress in his resistance to the plaintiffs' right to succeed. The plaintiff Halliday's evidence on this feature of the case was very unsatisfactory. He tried to deceive the Court into the belief that the money was actually paid by him to Ross, that is, that it was his money, and tried to account for where the money came from, concealing as far as he could the true facts. The plaintiff Ross was, however, quite frank, and gave the true version of it without any attempt at concealment of the actual facts. In my opinion, however, this has very little, if anything. to do as an element in the case. I read the portion of the agreement with reference to the payment of this money from Halliday to Ross as entirely for the benefit and protection of Ross. Why should the defendants complain that Halliday has not discharged his liability to Ross by payment in money? If Ross has discharged the liability without any consideration other than the taking by Halliday of the property back and taking a re-assignment of the agreement, why should the defendants complain? They are not prejudiced in any way. Halliday's position is made stronger, and his efforts to carry out his original agreement with the defendants made easier.

I am of the opinion that the defendants cannot complain of the manner in which the liability of Halliday to Ross is discharged, and that there have been no breaches of the conditions, terms, or covenants by Halliday, or Ross, entitling the defendants to a refusal of consent to a re-assignment.

The defendants set up a counterclaim, but agreed upon the opening of the case to abandon this claim, and I therefore dismiss the same with costs.

I think the plaintiffs are entitled to succeed and that specific performance should be decreed with costs.

MANITOBA.

MACDONALD, J. NOVEMBER 4TH, 1907.

TRIAL.

PAGET v. BENNETT.

Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase Money by Instalments—Default—Notice—Rescission—Construction of Contract—Specific Performance.

Action for specific performance.

J. S. Hough, K.C., and A. C. Ferguson, for plaintiff.

W. L. McLaws, for defendant.

MACDONALD, J.:—The plaintiff on 27th March, 1903, purchased from the defendant two lots in the city of Winnipeg for $200—$50 payable in cash and the balance in 3 equal annual instalments on 27th March in the years 1904, 1905, 1906, with interest at 6 per cent. The agreement of sale contains the following clause: "Provided that in default of payment of the said moneys and interest or any part or parts thereof on the days and times aforesaid or of performance or fulfilment of any of the stipulations, covenants, provisoes, and agreements on the part of the purchaser herein contained, the vendor shall be at liberty to determine and put an end to this agreement and to retain any sum or sums paid thereunder as and by way of liquidated damages, in the following method, that is to say, by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchaser at Winnipeg post office, and at the end of 20 days from the date of mailing the same the purchaser shall deliver up quiet and peaceable possession of the said lands and premises or any part thereof to the vendor or his agent immediately at the expiration of said 20 days."

A further term of the agreement was that upon payment of $50 of the purchase money the purchaser was entitled to a deed, upon his executing a mortgage in favour

of the vendor, the same to provide for the payment of the purchase money in accordance with the provisions of the agreement of sale.

The plaintiff could, therefore, demand a deed immediately upon payment of $50 of the purchase money, upon executing a mortgage, in which case the summary mode of cancelling the agreement could not be applied. A deed was not, however, asked for, and the parties are left to their rights and remedies under the agreement of sale.

On 12th August, 1903, the plaintiff made sale of the lots in question to Mrs. Tate for $250—$100 being paid down and the balance payable in 3 equal payments on 27th March in the years 1904, 1905, and 1906, corresponding with the dates of payment to mature under the plaintiff's agreement with defendant, and the agreement between the plaintiff and Mrs. Tate being in the same form as that between him and the defendant; there is no reference in this latter agreement to the agreement between the plaintiff and the defendant.

The plaintiff did not pay the instalment due on 27th March, 1904, under his agreement with the defendant, because, as he states, he had sold the lots to Mrs. Tate and received his equity out of them.

On 13th or 14th April, 1904, the plaintiff received from the defendant a notice of cancellation dated 11th April, 1904, and requesting him to deliver up possession of the premises in accordance with the agreement exhibit 1.

On receipt of this notice plaintiff notified Mrs. Tate and went to see defendant's solicitor, through whose office the notice was made out. There is a trifling conflict in the evidence as to what took place there, but I am satisfied from the subsequent conduct of the plaintiff that his intention was to make good the default under his agreement with the defendant. The defendant's solicitor told the plaintiff on this occasion that the agreement exhibit 1 was cancelled, and the plaintiff then consulted his solicitor, and on 22nd April, 1904, tendered the defendant the full balance due under his agreement with him; this the defendant refused to accept. The plaintiff then placed the matter in the hands of his solicitors, who on 30th April, 1904, gave defendant a written notice (exhibit 9), which was followed by the bringing of this action. I think, therefore, that the plaintiff has shewn himself ready and came as

promptly to the Court asking for relief as circumstances would permit.

The only point remaining for consideration is the interpretation of the agreement exhibit 1. It is clear, to my mind, that at the time of its execution it was never contemplated that the agreement would be at an end immediately upon default in payment of the moneys on the day the same became due, by the mailing of a notice such as is therein provided for, but rather that the purchaser would be entitled to the time specified during which he could make good his default, failing which the agreement would be at an end, and this, I think, is the reasonable interpretation of that clause in the agreement, and I am assisted in this interpretation by the wording in the clause in question providing for the mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine the agreement. That, I read to mean, "if you do not make good the default within the 20 days provided for in the agreement, I will carry out my intention and compel you, if you do not consent, to give up peaceable possession."

If this is not the interpretation of the agreement, and it is to be construed as enabling the defendant to terminate it on the very day upon which an instalment is in arrears by giving a notice as in this case, then I think the agreement is so unreasonable as to call for the equitable jurisdiction of this Court for relief against it, and I decide accordingly. There will be judgment for the plaintiff for specific performance together with costs.

MANITOBA.

MATHERS, J. NOVEMBER 5TH, 1907.

TRIAL.

BRETT v. FOORSEN.

Sale of Goods—Deceit—Breach of Warranty of Title—Incumbrance on Goods—Retaking by Person Entitled to Lien—Sale in the Ordinary Course of Business—Estoppel—Implied Authority—Fair Value—Misrepresentation as to Ownership—Costs.

Action to recover $257.50, the price paid by plaintiff to defendants for a team of horses, and also damages.

Plaintiff alleged that defendants represented to him that the horses were free from any claim or lien; he sold the horses, and subsequently the original owners took possession under a lien note made in their favour by defendant Foorsen. As a result of this, the purchaser from the plaintiff had sued the plaintiff for a refund of his purchase money; and plaintiff claimed $257.50 and damages.

A. B. Hudson, and W. D. Lawrence, for plaintiff.

C. P. Fullerton, for defendants.

MATHERS, J.:—This action, as originally framed, was one for deceit, but I allowed an amendment at the trial by which a claim for breach of warranty of title was added. The defendant Foorsen was not served with the statement of claim, and I allowed his name to be struck out and the action to proceed against the defendant Shore alone.

On 24th December, 1906, McLean, Handford, & Thexton, a firm of horse dealers carrying on business in Winnipeg, sold and delivered to Foorsen a team of horses for $425, receiving $200 in cash and an agreement in the form usually called a lien note for $225, maturing on 1st April, 1907.

About the last of December the defendants sold this team to plaintiff for $257.50 cash. Of this sum the defendant on the same day paid Foorsen $200, retaining $57.50 for his commission and to cover an account which Foorsen owed him. I find as a fact that the defendant was acting as agent for Foorsen for a commission, but I also find as a fact that Shore represented to the plaintiff that the horses were his own and that they were free of all mortgages and liens. I find that Shore had reasonable grounds for believing and did believe that the horses were in no way incumbered.

I find that the price paid by the plaintiff was the fair value of the horses in their then condition, and that he bought them bona fide. believing that he was dealing with the owner and that the horses were unincumbered.

The plaintiff took possession of the team and placed them in his own stable, and about 3 weeks afterwards he offered them for sale to McLean, the senior member of the above named firm. McLean went to the plaintiff's stable and saw and recognized the horses there as those he had sold to Foorsen, and on which he gave a lien note.

He did not say whether or not he would buy the horses, and gave as a reason for his indecision that he was expecting a car load of horses, and if it arrived he would not want this team. He asked plaintiff to see him the following day when he would give a definite answer. The plaintiff spoke to McLean next day and was told that he did not want the team, but he remained entirely silent as to the lien note, or his claim upon the horses.

The plaintiff was then and is still a horse and cattle dealer, and I infer that McLean was aware that such was his business; that he had bought the team for the purpose of re-selling them; and that he was then endeavouring to and probably would re-sell them, believing that he had a good title.

The plaintiff Brett took into partnership one Magshok. who was at the trial added as a co-plaintiff, and transferred to him a half interest in the horses, and on or about 2nd February the plaintiffs re-sold the team to one Pelakise for $425, receiving $100 cash and two notes for $200 and $125 respectively. The team was then in much better condition than when the plaintiff Brett bought them.

On 26th February Foorsen absconded without having paid the lien note given for part of the purchase price to McLean & Co.

The horses remained in Pelakise's possession for about two months, when they were seized by McLean & Co. under the lien note.

Pelakise, who had in March paid the plaintiffs the $200 note above referred to, brought an action in the County Court of Winnipeg for a refund of the moneys so paid, to which action a defence has been entered, and the action is still pending in the County Court.

The plaintiffs in this action claim a refund of the price paid for the horses, and damages.

The defendant relies upon 3 grounds of defence.

First, that in making the sale he was acting as agent for Foorsen, and that any representations made were so made bona fide and in good faith and in full belief of their truth.

Secondly, that at the time McLean & Co. sold the horses in question to Foorsen and took the lien note upon them, they well knew that the business of Foorsen was that of a horse dealer, and that he was buying the horses for the purpose of re-selling them at a profit, and that they are

therefore estopped from now claiming the horses under the lien note as against the plaintiff.

Thirdly, that McLean & Co. were estopped from repossessing the horses from Pelakise under the lien note, because McLean saw the horses in Brett's possession, and knew that he then claimed them as owner, and that he was endeavouring to sell them, and wilfully omitted to notify Brett of McLean & Co.'s claim.

In the view I take of this case it is only necessary to deal with the second ground of defence raised.

McLean & Co. were dealers in horses on a somewhat extensive scale. Foorsen was also a dealer in horses, that is, his business was buying horses and re-selling them. McLean knew that such was Foorsen's business. On a number of occasions, both before and after the sale in question, his firm had sold horses to Foorsen, both for cash and on credit. When the sale was a credit, a lien note was generally taken, but on one or two occasions an ordinary promissory note alone was taken. In each case the horses were delivered over to Foorsen at the time the bargain was made. McLean knew that the horses bought by Foorsen were so bought for the purpose of being re-sold at a profit, if possible, and they were delivered by McLean & Co. to him, knowing and intending that he should re-sell them in the course of his business.

I infer that the team in question was delivered by McLean & Co. to Foorsen for the purposes of his business, well knowing that in the ordinary course of such business the horses would most probably be sold to an innocent member of the public. The fact that McLean expressed no surprise or made no complaint when he found that Foorsen had disposed of the horses, and that they were then in the possession of the plaintiff Brett, who claimed them as owner, strongly supports that inference. He seems to have taken it for granted that Foorsen would sell; hence he was in no way surprised when he found that he had done so.

Under these circumstances, must it not be held that Foorsen had implied authority to sell the horses in the ordinary course of his business and transfer the whole ownership to his vendee? If, instead of a lien note, McLean & Co. had taken a chattel mortgage on the team, I think the authorities are clear that Foorsen would have had implied authority to sell them in the ordinary course of

business, freed from McLean & Co.'s claim under the chattel mortgage.

In National Mercantile Bank v. Hampson, 5 Q. B. D. 177, it was held that a farmer who gave a bill of sale upon his growing crops to the plaintiff, and who remained in possession, had an implied license to carry on his business and to sell the wheat and that the defendant, a corn merchant, who bought bona fide, got a good title. This case was followed in Walker v. Clay, 49 L. J. Q. B. 560. In this latter case an innkeeper and horse dealer gave the plaintiff a bill of sale on his personal property, including three horses. Without the plaintiff's consent the grantor sold the three horses by public auction, and one of them was purchased by the defendant. In an action of trover brought against the purchaser by the grantee in the bill of sale, it was held that the object of the bill of sale was to enable the grantor to carry on his business, and must therefore be taken to have contemplated a sale, and that the action was not maintainable. In the case at bar the sale by McLean & Co. was to assist Foorsen in carrying on his business, and to my mind most clearly contemplated a sale by him.

The principle of these cases was approved by the Supreme Court of Canada in Dedrick v. Ashdown, 15 S. C. R. 227, reversing the decision of the full Court of Queen's Bench for Manitoba, Dedrick v. Ashdown, 4 Man. L. R. 140, where the full Court reviewed and refused to follow the English cases.

I am utterly unable to distinguish between the case of the grantor in a chattel mortgage who remains in possession of the mortgaged property, selling it in the ordinary course of his business, and giving a good title to a bona fide purchaser without notice, and the case of a person who is in possession of property which he has bought on credit, the title to remain in his vendor until paid, doing the same thing. The reason for the application of the doctrine in the latter case is even stronger than in the former. A chattel mortgage must be registered, and a prospective purchaser has therefore means of ascertaining whether or not the goods he proposes to buy are incumbered, but in the other case the purchaser has nothing to rely upon but the honesty of his vendor.

Sub-section (b) of sec. 26 of the Sales of Goods Act, R. S. M. 1902 ch. 152, does not prevent the application of the principle I have been discussing to this case. All that sub-section does is to prevent the application of sub-sec. (a) of the same section to cases such as this. What sub-sec. (a) says, in effect, is that where a person having bought or agreed to buy goods obtains possession thereof with the consent of the seller, the delivery of the goods under any sale to a bona fide purchaser without notice shall give such purchaser a good title; and sub-sec. (b) excepts from its operation goods purchased under a lien note. The principle I have been invoking does not, however, depend for its application on this sub-section, but is based on the implied authority which the maker of the lien note has to sell the goods covered by it in the ordinary course of his business; but it might also be based upon the principle of estoppel: Ewart on Estoppel, p. 352. It would not apply if the sale were fraudulently made or not in the ordinary course of business. That is laid down in Taylor v. McKeand, 5 C. P. D. 358. And, although in that case the jury found that the purchaser bought bona fide, yet it was the case of a trader selling his whole stock in trade, which could hardly be held to be a sale in the ordinary course of business, and a perusal of the judgment will shew that such was the ground on which it was rested. The only fact in this case that would seem to indicate anything exceptional is that, whereas Foorsen bought for $425. in a short time afterwards he sold for $257.50. The horses were not in good condition; one of them had spring halt, and the other had been blistered for indigestion.

Whatever the explanation may be as to the apparently high price Foorsen agreed to pay, I have no hesitation in holding, on the evidence before me, that $257.50 was the fair value of the horses at the time of the sale to the plaintiff Brett. One Ketcheson, an independent witness, in whom I place entire reliance, swore that he examined the horses while in Foorsen's possession with a view to buying them and that he refused to give $225 for them.

I find, as a fact, that the sale was made by Foorsen in the ordinary course of his business to the plaintiff Brett, through the defendant Shore, who, though ostensibly selling as owner, was really acting as agent for Foorsen.

I also find that Brett bought bona fide without any notice of McLean & Co.'s title.

Upon these facts, and applying the principle of the case above referred to, I hold that Brett got a good title free from any claim McLean & Co. might have.

It follows that the plaintiffs cannot succeed against the defendant.

The action will be dismissed, but. as the defendant by his misrepresentation as to the ownership of the horses brought the action upon his own head, there will be no costs.

MANITOBA.

MATHERS, J. NOVEMBER 5TH, 1907.

TRIAL.

COUSE v. BANFIELD.

Principal and Agent—Agent's Commission on Sale of Land —Purchaser Procured by Agent—Finding that Agent not Employed by Defendants.

Action by a real estate broker for a commission on the sale of land.

G. A. Elliott, for plaintiff.

T. R. Ferguson and J. A. McKay, for defendants.

MATHERS, J.:—This is an action by a real estate broker for commission. Pratt & Dixon, who were in possession of the Metropolitan Hotel in Winnipeg under an agreement to purchase, got into financial difficulties with their creditors. A meeting of creditors was held at the office of Mr. Hull, a solicitor, at which it was resolved that one Wilson and one Kobold should be appointed trustees of the Pratt & Dixon estate; that the property should be transferred to them with authority to conduct the hotel for one month; that they be authorized to sell the hotel at $60,000; and if they could not sell at that price they should submit any offers obtained, and that they report back to the creditors.

An assignment of the agreement under which Pratt & Dixon held the property was executed in favour of Wilson

& Kobold. Afterwards Wilson and Kobold retired from the trusteeship, and at a meeting of creditors the defendants were appointed to succeed them, and a further assignment of the Pratt & Dixon agreement was made to them.

Mr. Hull appears to have acted as solicitor for the general body of creditors, and for the trustees.

It was the wish of the creditors that the property should be sold, and efforts were made by Mr. Hull to that end. The total of the creditors' claim amounted to about $55,000.

Mr. Hull listed the property with the plaintiff for sale, but there is no evidence that either the general body of creditors or the defendants authorized Mr. Hull to do so; and the defendants had no knowledge at the time that he had done so. Mr. Hull gave the plaintiff the price and terms of sale, and he, the plaintiff, then went to Pratt & Dixon and made an arrangement about the amount of commission to be paid in the event of a sale. In his examination for discovery, put in evidence, the plaintiff says: "I made an arrangement with Pratt & Dixon and also with Mr. Hull regarding the commission. Pratt & Dixon were agreeable to pay me $1,000 commission, making the statement that the creditors seemed to be losing money, and everybody seemed to be coming out at the small end of it." Asked if the bargain relative to the commission was made with Pratt & Dixon or with Mr. Hull, he replied, with Pratt & Dixon. Asked if he was sure about it, his reply was "positive." He then once more relates the bargain with Pratt & Dixon as to commission: "That they would be willing, if I made a sale of the property upon the price and terms mentioned, to pay $1,000 commission, which Mr. Hull had no objection to either." Further on he is asked if Pratt & Dixon said that they would pay the commission; he replied: "They were willing that if the sale went through I should be paid a commission of $1,000."

The same day the plaintiff had this conversation with Pratt & Dixon, he submitted the property to one John McDonald, who agreed to purchase at $57,000. The defendants, Pratt & Dixon, and the purchaser McDonald, then met in Mr. Hull's office, and the purchaser paid to Mr. Hull a deposit of $1,000, and obtained a receipt setting out the terms of sale. This receipt contained the following clause: "A commission is to be paid to Frederick Couse & Company of $900, as agreed with Mr. McDonald, and if any further commission is payable Mr. McDonald agrees to assume the responsibility for it."

The receipt was signed by the defendants. Below was written, "I accept the above," signed by John McDonald, the purchaser, and "We agree to above," signed by Pratt & Dixon.

Before the receipt was signed, and whilst all the above named parties were present in his office, Mr. Hull spoke to the plaintiff by telephone and induced him to reduce his commission from $1,000 to $900. Either on the same day or the following day McDonald, the purchaser, went into possession of the hotel, and he continued in possession for between 2 and 3 months, but he made no further payment on account of the purchase money. He then procured his solicitors to write to Mr. Hull's firm a letter stating that he would be unable to carry out the proposed purchase, owing to his being unable to make necessary financial arrangements. The evidence satisfies me that McDonald was amply able to carry out his bargain, yet, for some reason that does not clearly appear, neither the defendants nor the creditors took any steps to compel him to do so, but quietly acquiesced in his abandonment of it. An explanation is probably to be found in the fact that the defendant Banfield subsequently became purchaser from the mortgagees upon his own account, without, however, the knowledge of his co-trustee.

This case, to my mind, turns entirely upon the question of whether or not the plaintiff was employed by the defendants to make the sale. I have no hesitation in finding that the plaintiff found a purchaser ready, able, and willing to buy, and that the defendants entered into a binding contract with the purchaser for the sale to him of the property. I have no doubt the defendants could have enforced the contract as against the purchaser, and, had they done so, the plaintiff would have been paid his commission. I think, however, I must find on the evidence that the plaintiff was not employed by the defendants. I cannot reasonably interpret the examination of the plaintiff for discovery in any other way. There is also the additional fact that in his books he charged the commission to Pratt & Dixon, and not to the defendants, although he knew at the time that the defendants were the trustees of the property. My deduction from the evidence is that the plaintiff's agreement was with Pratt & Dixon, by whom he was employed to make a sale of the property, and that he obtained Mr. Hull's assent to the payment of the commission

agreed upon so as to bind the creditors to the payment thereof out of the proceeds of the sale.

The fact that Mr. Hull, the man by whom the plaintiff says he was employed, was not called as a witness, is not without significance. The clause in the receipt providing for payment of commission is quite consistent with the employment of the plaintiff by Pratt & Dixon. It means nothing more than that a commission is to be paid, out of the proceeds of the sale, to the plaintiff.

I find, though with considerable reluctance, that the plaintiff has failed to prove a contract with the defendants, either express or implied, to pay him a commission.

There is no way by which, in this action as constituted, the $1,000 paid by McDonald can be made available to pay the commission earned by the plaintiff, although it is possible some such relief might be worked out on some other form of action.

The action must be dismissed.

I was much disposed to withhold from the defendants costs, on the ground that they had benefited to the extent of $1,000 by the plaintiff's efforts; but, on the other hand, the plaintiff brought this action seeking to enforce a contract as against the defendants which he had made with others—a mistake to which, as far as I can see, the defendants in no way contributed. I think the defendants are entitled to the costs of suit.

BRITISH COLUMBIA.

(NEW WESTMINSTER.)

CANE, Co. C.J. NOVEMBER 6TH, 1907.

COUNTY COURT.

McINSLEY v. GILLEY.

Water and Watercourses — Tidal and Navigable River — Fisherman—Licensee under Fisheries Act—Destruction of Net by Passing Steamer—Obstruction of Channel—Rights of Navigation—Failure to Establish Wanton Act.

The plaintiff was a fisherman, entitled to fish for salmon with nets in the tidal waters of British Columbia dur-

ing the legal season of 1907, at the Fraser river, which river was admitted to be a tidal and navigable river.

The plaintiff sued the defendant for damages caused by the defendant's steamer "Robert Dunsmuir" coming in contact with his net and cutting a portion out of it and seriously straining the remainder.

Bole, for plaintiff.

Whealler, for defendant.

CANE, Co.C.J.:—I must find on the evidence that the steamer was passing up the river from plaintiff's wharf at New Westminster on her usual course in a direct line for the north passage of the channel of the river under the swing of the bridge; that the bridge had opened to let the steamer through; that the plaintiff's net was in the course of the steamer; that everything was done by the captain of the steamer to reverse his engines, and avoid coming into contact with the net, so soon as he observed it; but that the steamer could not be brought to a stop, and the cutting was unavoidable.

The plaintiff holds a license from the Crown issued under the Fisheries Act, being R. S. C. 1906 ch. 45, which statute, by sub-sec. 4 of sec. 47, enacts: "The main channel or course of any stream shall not be obstructed by any nets or other fishing apparatus; and one-third of the course of any river or stream, and not less than two-thirds of the main channel at low tide, in every tidal stream, shall be always left open, and no kind of fishing apparatus or material shall be used therein."

Sub-section 2 of sec. 47 of the same Act says: "Seines, nets, or other fishing apparatus shall not be set in such a manner or in such places as to obstruct the navigation with boats and vessels, and no boats or vessels shall be permitted to destroy or wantonly injure in any way any seines, nets, or other fishing apparatus lawfully set."

This is the law under which the plaintiff claims a right of action.

He has not satisfied me that he did leave one-third of the course or two-thirds of the channel free; in fact, the length of his net and the evidence of the position of his net are against him.

But, supposing he had established this, he could not succeed unless he established a wanton act on the part of

the master of the vessel, which he entirely failed to do. "The right of soil in arms of the sea and public navigable rivers which the Crown prima facie has, independently of any ownership in the adjoining land, must in all cases be considered as subject to the public rights of passage, however acquired, and any grantee of the Crown must of course take subject to such rights:" Mayor of Colchester v. Brook, 7 Q. B. 339, 374.

In Kent's Commentaries, vol. 3, part 6, sec. 52, the American, as founded on the English law, is spoken of as adopting the same principle.

And in Angell on Watercourses, referring to Kent's Commentaries, it is said (ch. 13, sec. 558): "The public right of navigation seems to have been ever regarded as paramount to the rights of fishery. That is, should an individual in the exclusive piscatory rights which he has by virtue of riparian ownership or which he has by a special grant in those waters, the right to the soil of which is prima facie in the government, set a seine therein, he can have no redress if he is disturbed by the passage of water craft." Angell justifies this statement by the authority of Post v. Munn, 1 South's (New Jersey) Reports 61, where the owner of such a fishery sued for compensation for injury done to his nets by a vessel when in the ordinary course of navigation, and was held not entitled to recover.

Baron Wood in an anonymous case at the Durham Assizes in 1808, 1 Camp. 517 n., held that "if an individual has a right of fishery in a navigable river, it is subject to the rights of the public to use the river for all the purposes of navigation."

The authorities on the question are well collected in Gann v. Free Fishers of Whitestaple, 11 H. L. C. 192, wherein the Lord Chancellor (Lord Westbury) said: "The bed of all navigable rivers where the tide flows and reflows and of all estuaries and arms of the sea is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential to the full enjoyment of that right. If the Crown, therefore, grants part of the bed or soil of an estuary or navigable river, the grantee

takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interfere with the enjoyment of the public right."

The inalienable right of the public to free and uninterrupted navigation is clearly set out in the cases, and any fisherman under a license, however obtained or by whom granted, who places a net or other obstruction in a navigable course of a tidal river, undoubtedly impedes navigation, and has no recourse for injury to such obstruction.

The plaintiff's action will be dismissed with costs.

EXCHEQUER COURT OF CANADA.

(BRITISH COLUMBIA ADMIRALTY DISTRICT.)

MARTIN, LOC. J. NOVEMBER 11TH, 1907.

TRIAL.

CABLE v. SOCOTRA.

Ship—Claim for Wages by Cook—Jurisdiction of Court—Amount under £50—Merchant Shipping Act, 1894, sec. 165—Exception—Contract—Whole Voyage—Cook Left Behind at Intermediate Port because of Illness—Proper Sanction—Voyage Terminating in United Kingdom—Sec. 166 (1) of Act—Discharge—Written Consent of Master—Ill-usage—Certificate—Termination of Engagement—Costs.

Action by a ship's cook for wages.

Lowe, for plaintiff.

Peters, K.C., for defendants.

MARTIN, J.:—With respect to the opening objection to the right of the plaintiff to invoke the aid of this Court, based upon the bar set up by sec. 165 of the Merchant Shipping Act, 1894, because the claim is under £50, I am of the opinion that Mr. Lowe's contention is correct, viz., that the facts clearly bring it within the 4th exception to that section, and therefore the action is properly brought.

The ship is a British bottom, registered at Glasgow, and is on a voyage from Shields to Los Angeles (California), Seattle, Victoria, and back to Shields, from which last port she sailed on 26th January, 1907. The plaintiff shipped for the whole voyage as cook and steward, at £5 per month, and was left behind at Los Angeles on 18th July, for the reason that he was admittedly unfit and unable to proceed to sea because of illness, being at that time in the hospital, wherein he was detained 50 days, owing to an accident to his leg that he sustained in the cook's galley, which injury was aggravated by the fact that he had for some time been suffering from varicose veins, which necessitated an operation in the hospital at Los Angeles.

I pause here to say that I am satisfied that the charges he makes against the master or mate for neglect of duty, either as regards the supply of sufficient oil to light the galley or as regards humane attention to him after his accident, are not, in my opinion, based upon anything substantial.

It is alleged by the plaintiff that he has never been lawfully discharged, and is therefore still on the ship's articles, and entitled to his wages to the date of the writ.

In answer to this the defendants rely on sec. 166 (1) of the Merchant Shipping Act, 1894, as follows: "Where a seaman is engaged for a voyage or engagement which is to terminate in the United Kingdom, he shall not be entitled to sue in any court abroad for wages, unless he is discharged with such sanction as is required by this Act, and with the written consent of the master, or proves such ill-usage on the part or by authority of the master, as to warrant reasonable apprehension of danger to his life if he were to remain on board."

If, therefore, the plaintiff has not been "discharged with such sanction as is required by this Act" (see sec. 36 of the Act in the revision of 1906 for the procedure), he cannot maintain this action, seeing that both the voyage and his engagement are to "terminate in the United Kingdom," unless he "proves such ill-usage," etc. This he has attempted to do, but I need only say that he has failed to convince me that there is any good ground therefor. The consequence of this is that, unless he was discharged, despite his contention to the contrary, his action must be dismissed. But the defendants contended that

he was both duly discharged and left behind under secs. 30, 31, 32, 36, 37, 38, and 39 of the Merchant Shipping Act, 1906.

First, in regard to the question of leaving behind. This is a procedure and matter quite distinct from that of a discharge, as is clearly shewn by said sections, particularly Nos. 158, 36, and 37, and I have no difficulty in coming to the conclusion here that the proper sanction was obtained to leave the plaintiff behind, and that consequently and by operation of sec. 158 the service "terminated" (as to which cf. Sivewright v. Allen, [1906] 2 K. B. 81), on 18th July, and that the plaintiff, as the section provides, is "entitled to wages up to the time of such termination, but not for any longer period." It was urged on behalf of the plaintiff that this procedure was dependent upon the delivery by the master, to the proper authority, of "a full and true account of the wages due to the seaman," under sec. 37, and that if such an account were not delivered the proper authority could not grant the necessary certificate. It is admitted that the account made out by the master was incorrect, and I find that he should have allowed the seaman $1.70 more than he did.

After a carful consideration of all the various sections which might throw light on this matter, I have come to the conclusion that this is not the proper construction of the Act, for the granting of the certificate is clearly in the nature of a judicial act of the authority, under sec. 36, which stands apart from and is to be determined before any question arises as to the duty of the master regarding the payment of wages under the following section, 37. Indeed, it must be so, as this case illustrates, for the question as to whether or no the plaintiff was, in the opinion of said authority, fit to proceed to sea, could not from any point of view be dependent upon the amount of his wages. The fact that he did lie in the hospital for 50 days shews how impossible it would be to give effect to a contrary view, for it would defeat the intended remedy.

Then, second, with regard to the discharge. I am satisfied on all the evidence that the master duly obtained the sanction of the proper authority, under said sec. 30, to discharge the plaintiff, and my observations with respect to leaving behind apply in principle to this procedure. And I find that the master did in fact make out a cer-

tificate of discharge for the seaman, as required by sec. 31, though, in view of the not unreasonable uncertainty of the master in regard to the signature on exhibit 7, purporting to be his, I am not satisfied that said exhibit 7 is the original discharge, but, since it was obvious that the uncertainty of the master was, as he explained, largely due to the strange fact that the certificate, exhibit 7, was dated 22nd August, instead of 18th July, on which date the master left it with the vice-consul, it may be that after all it is really the original certificate, though signed in blank by the master on 18th July, and the otherwise unaccountable date (which not unnaturally created the uncertainty) is the day upon which the vice-consul filled in the blank and gave it to the plaintiff, when he called upon him after leaving the hospital, which in fact would be 22nd August, because the plaintiff says he went there on the 3rd July and stayed there 50 days. This document, moreover, is the same which the consul-general at San Francisco says, in his letter of 30th September to the shipping master here, was left with him by the plaintiff. However, be that as it may, I am satisfied, as has been said, that a proper certificate was made out, and I should be inclined to think, if anything turned on the point, that in the circumstances the leaving of such certificate with "the proper authority" (here the vice-consul) was a sufficient "giving" thereof to the seaman to satisfy said sec. 31.

The result is that, had the master left the correct account and amount of wages with the proper authority, the plaintiff would have had no claim upon the ship, for all the master's obligations would have been discharged under and by virtue of secs. 38 and 39. Unfortunately, however, the master made a slip which, though an honest one, nevertheless placed the seaman in a position of embarrassment, and the fact is that he has never yet had deposited to his credit in the hands of any proper authority or formally tendered to him, either in California or here, the full amount of the balance of his wages, and consequently he was justified in refusing to accept the offer of $13.65 in full settlement of his demands. Indeed, nothing has yet been paid into Court to satisfy his claim, and it is plain that the defendants cannot invoke the statute to support an insufficient deposit of wages, and therefore the plaintiff is entitled to judgment for $15.35, being the

balance of the amount that should have been paid to him on 18th July, when his engagement terminated by operation of sec. 158.

With respect to costs, though the matter is small in amount, yet it is not so in principle, and difficult questions were raised which are of general importance to masters and seamen. Though the plaintiff is obviously of a peculiar disposition, and did not create a favourable impression in the witness box, and has advanced extreme claims, both legal and on the merits, which have been disallowed, yet at the same time he was undoubtedly placed in a very perplexing position by the neglect of the master (though quite unintentional) to perform his statutory duty and make out a correct account of his wages, which, I may say, is a matter wherein great care should be taken to see that the mariner is allowed everything that is justly due to him. If he is not, this Court should, I think, in pursuance of its general policy to protect to every reasonable extent the interests of mariners, give him his costs of recovering his wages in full, however trifling the amount, unless there are stronger reasons than are to be found in this case for depriving him of them.

BRITISH COLUMBIA.

(VANCOUVER.)

CLEMENT, J. NOVEMBER 11TH, 1907.

TRIAL.

WATTS v. WATTS.

Divorce—Jurisdiction of Supreme Court of British Columbia—Law of England—Introduction — Proclamation of 1858 — Divorce and Matrimonial Causes Act, 1857 — Inapplicability from Local Circumstances—Authority of Previous Decisions—Courts of Co-ordinate Jurisdiction.

Petition by husband for divorce.

J. J. Russell, for the petitioner.

C. M. Woodward, for the respondent.

Charles Wilson, K.C., for the Attorney-General for British Columbia.

CLEMENT J.:—I see no reason why a Judge should apologize at any time for a speedy delivery of judgment. And, in this particular case, the issues involved are of such vital importance, not so much perhaps to the immediate parties as to many others confronted now with disquieting possibilities of undeserved opprobrium, that as speedily as may be those issues should come before a Court empowered to speak with finality upon them. In this case, if ever in any, "interest republicæ ut sit finis litium," so that, having reached a considered opinion, I feel it my duty to dispose of the case at once in order that there need be no delay in carrying it to appeal.

In S—— v. S——, 1 B. C. R. pt. 1, p. 25, the one case in which is discussed the question with which I have now to deal, the then 3 Judges of the Court (Begbie, C.J., Gray and Crease, JJ.), sat, not in banc or as an appellate tribunal, but in supposed conformity with the requirements of the Divorce and Matrimonial Causes Act of 1857, to hear a petition for a decree of nullity of marriage on the ground of impotency. The two puisne Judges held that they had jurisdiction in the premises. The Chief Justice dissented. Owing, as I am given to understand, to his refusal to join in the exercise of the alleged jurisdiction, the view put forward by Mr. Justice Gray that one Judge sitting alone could exercise the full powers of the Court, was adopted in practice and has since been uniformly followed.

If I do not discuss at any length the views expressed by the learned Judges in S—— v. S——, it is not because I have not carefully considered them. When first called upon to exercise jurisdiction in divorce, I was at once struck by the fact that the jurisdiction, if it exists, is unhappily in one way so fettered and in another so unfettered as to place a Judge in a very unenviable position. Tied down to the law of 1858, he has none of the safeguards which now obtain in England against collusive actions—I mean the granting in the first instance of a decree nisi and the reference of the case to the King's Proctor for investigation, and, if necessary, intervention. While, on the other hand, as the full Court has held in Scott v. Scott, 4 B. C. R. 316, there is no appeal from his decision to any tribunal in this province. This very unsatisfactory state of affairs led me to an anxious consideration of the whole question of the Court's jurisdiction, and to ask at the first opportunity that counsel

should argue the point. At my suggestion the provincial government has instructed counsel to argue in support of the Court's jurisdiction. I have endeavoured to keep an open mind throughout Mr. Wilson's able argument; but, if I may say so without offence, he has advanced nothing that I had not already carefully debated in my own mind. Since the argument I have read with care all the cases he cited and many others. In the result, the view I take is so decided that, for the reasons above indicated, I should give judgment at once.

I assume for the purpose of this judgment that the jurisdiction of this Court prior to 1871 was and still is of the widest character—viz.—as stated in Sir James Douglas's proclamation of June, 1859, establishing the Court—"jurisdiction in all cases civil as well as criminal" arising within the province. But an enactment creating a Court and defining its jurisdiction does not usually, and it did not in this instance, add to the existing body of substantive law. It provides usually, and it provided in this instance, a tribunal to safeguard and enforce such rights only as exist under the substantive law from time to time in force. So that usually, and in this instance, we must look elsewhere for the substantive law.

Admittedly there is no legislation emanating from a British Columbia legislature prior to the date (1871) when British Columbia became a Canadian province, dealing specifically with the subject of the dissolution of marriage. And, of course, there could be none since that date, "divorce" being one of the matters assigned to the exclusive ken of the federal Parliament. And that Parliament has passed no Act on the subject. But the contention is that the law of England, civil and criminal, as it existed in November, 1858, was introduced at an early date into British Columbia, and that this law of England, so introduced into British Columbia, included a law on this subject of divorce. If so, it would clearly be the right and duty of this Court to uphold and enforce whatever rights and remedies existed under or were provided for by that law. The question of course is: Was any such law introduced?

To solve this question it is necessary to consider, in the first place, the language of the enactment by which English law was introduced into British Columbia. By proclamation of 19th November, 1858, Sir James Douglas, Governor

of the Mainland Colony of British Columbia, ordained that "the civil and criminal laws of England, as the same existed at the date of said proclamation, and so far as they were not from local circumstances inapplicable to the colony of British Columbia, were and should remain in full force within the said colony"—subject, of course, to future legislation. After the union of the island and mainland colonies, the above provision was extended to the united colony.

I am of the opinion—at all events I assume—that the use of the double negative throws the burden upon him who asserts that a given English law, statutory or other, of date prior to November, 1858, was not introduced into British Columbia. He must establish the affirmative proposition that the law in question was "from local circumstances inapplicable" to British Columbia.

This drives one at once to an examination of the English law on the subject of divorce as it stood in November, 1858. So far as concerns the question of a dissolution of marriage by judicial decree—which is all I have to deal with—the examination is necessarily limited to the Divorce and Matrimonial Causes Act of 1857. Prior to the passage of this Act no such judicial decree was possible; only the omnipotence of Parliament could dissolve the marriage tie. What then was the law embodied in the Act of 1857?

Here again we have an enactment one large purpose of which was to create a Court and define its jurisdiction. In so far as it follows out this purpose, it is essentially local. The Court was to be composed from time to time of Judges occupying certain positions on the Bench of existing English Courts, and it was to have jurisdiction theretofore exercised by the Ecclesiastical Courts in England and certain new and additional jurisdiction. The Ecclesiastical Courts of England, it may be noted, had no counterpart in the colonies: In re Lord Bishop of Natal, 3 Moo. P. C. N. S 115. It really seems idle to labour further the proposition that in so far as the Act of 1857 was limited to the creation of a Court, it was a purely local English law, clearly inapplicable to British Columbia.

But substantive law is sometimes (e.g., in the Judicature Acts) found among the clauses of a statute the main purpose of which is to create a Court, and to some extent that is the case in the Act of 1857 now under examination. Having created an exceptionally strong Court to take over

the jurisdiction theretofore exercised by the Ecclesiastical Courts, it was deemed expedient to withdraw divorce legislation from Parliament — practically though of course not legally—and to elevate a moral right to legislative favour into a legal right enforceable in a court of justice. But not in any of the ordinary Courts, only in this exceptionally strong Court, and in it only when constituted in an exceptionally strong way of three Judges, of whom the Judge of the newly created Court of Probate was to be one. The Act did undoubtedly, I think, create a new right as between husband and wife in England, but, in my opinion, only sub modo. The new right was so inseparably incidental to and bound up with the jurisdiction of an essentially local Court, that I cannot bring myself to view it as other than itself essentially local. It is impossible, in my opinion, to segregate the bare right to a judicial decree from the local conditions as to its enforcement. These local conditions did not and could not exist in British Columbia. Sir William Grant's description of the Mortmain Act (Attorney-General v. Stewart, 2 Mer. at p. 160), might well, it appears to me, be taken as a pen-picture, accurate in every detail, of the Divorce and Matrimonial Causes Act of 1857: "In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable without great incongruity of being transferred as it stands into the code of any other country."

Attorney-General v. Stewart was approved of and followed in the House of Lords: Whicker v. Hume, 7 H. L. Cas. 124, 28 L. J. Ch. 396.

In short, I am of opinion that the law enacted by the Divorce and Matrimonial Causes Act of 1857 was for local circumstances wholly incapable of application to British Columbia; and I cannot bring myself to hold that the establishment by colonial enactment, couched in general terms, of what I may call an ordinary Court, with general jurisdiction throughout the colony, was intended or would suffice to make it an extraordinary Court with the extraordinary, almost revolutionary, jurisdiction of the lately created English Divorce Court.

I might suggest, without going further than mere suggestion, a somewhat analogous question: Could the colonial

Court exercise jurisdiction in bankruptcy, as that phrase was understood in England, without a local colonial law on the subject of bankruptcy? And I might refer to L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31, for a definition or description of bankruptcy as a conception dependent on legislation. So, in my opinion, was the right to a judicial decree dissolving marriage dependent upon and conditioned by the legislature which created it.

One question, not touched upon in S—— v. S——, appears to me to have an important bearing. If the jurisdiction contended for exists, does a decree of divorce pronounced by this Court confer a right to remarry? Evidently a most vital question, the final solution of which ought not to be delayed for one moment longer than necessary. This question of the right to remarry after decree is discussed in the carefully considered judgment of Sir Cresswell Cresswell (speaking for the full Court) in Chichester v. Chichester, 32 L. J. P. 146, at p. 151. . . .

The right, then, is a statutory right under sec. 57. But sec. 57 depends upon and must be read with sec. 56. Section 56 is a section unequivocally local, providing for an appeal to the House of Lords. No such appeal lies from any colonial Court. The right to remarry arises only upon the expiration of the time for appeal, "but not sooner." Is that time, in the case of a decree of this Court, to be fixed, by analogy, with reference to the time within which a final appeal may be taken to the Privy Council? What was that time in 1858? What is it now? This is an incongruity greater, it seems to me, than any in the mind of Sir William Grant when he spoke the words I have quoted above from Attorney-General v. Stewart, and makes it impossible for me to say that the law enacted by the Divorce and Matrimonial Causes Act of 1857 was other than inapplicable in British Columbia, when such a vital matter as this right of remarriage would be left to depend on the arbitrary adoption of a doubtful analogy.

There is, in my opinion, no authority binding me to decide contrary to my own deliberate conviction as to what is the law. In the only case (Scott v. Scott, above referred to) before an appellate tribunal, it was unnecessary to consider the larger question. The full Court held that it at all events was without jurisdiction in divorce. It is unnecessary to cite authority for the proposition that want of juris-

diction can never be cured by reiterated instances of its exercise, or—perhaps I should say—of attempts to exercise it. Ex nihilo nihil fit. To this case the principle of stare decisis, valuable rule of expediency as it undoubtedly is, can have little application. The question, however, can never, being a question of jurisdiction, be "decided" short of the Privy Council, or, better still, by legislation. But I realize fully the responsibility I shoulder in giving effect to my own view, in face of many decrees pronounced by British Columbia Judges. Against that I may put these facts: (1) that this question of jurisdiction has never, so far as I can learn, been considered in any case other than S—— v. S—— and (incidentally) Scott v. Scott; (2) that at least 3 very able Judges in British Columbia have, as is well known, declined to exercise this jurisdiction; and (3) that no attempt has ever been made, so far as I know, to invoke the aid of the Courts in Manitoba or the North-West Territories along this line, notwithstanding the fact that the law of England as it stood in 1870 was introduced there in terms almost identical with those of Sir James Douglas's proclamation. I might add that the course taken by Sir Gorell Barnes in Dodd v. Dodd, [1906] P. 189, would seem to be a precedent for the course I have felt myself bound to take in this case. He declined, under the circumstances of that case, to follow the reported decisions of two eminent Judges of co-ordinate jurisdiction.

It becomes unnecessary, in the view I have taken, to express any opinion on the question as to how the jurisdiction is to be exercised, if it exists. It seems to me, however, that if the right to a judicial decree of dissolution created by the Act of 1857 became the right of a spouse in British Columbia by virtue of the Douglas proclamation, it was a right to be enforced by the ordinary procedure of the Court as laid down in the Rules of Court promulgated by Begbie, C.J. That he made no specific provision for proceedings in divorce cases shews this at least, that he—co-eval, as Mr. Justice Gray expressed it, with the law in British Columbia—had no notion that the English Divorce and Matrimonial Causes Act of 1857 had operative effect in British Columbia.

The petition is dismissed, but without costs. I may, I think, be pardoned for expressing in the strongest possible terms the hope that those charged with the oversight of the administration of justice in this province will take forth-

with such steps as may be necessary to have this delicate question promptly set at rest.

At counsel's request entry of judgment is stayed until further order.

BRITISH COLUMBIA.

(VICTORIA.)

IRVING, J. NOVEMBER 11TH, 1907.

CHAMBERS.

RE SIMPSON.

Lunatic—Appointment of Committee—Security and Undertaking—Practice.

Petition under sec. 27 of the Lunacy Act for an order committing the management of the property of a lunatic, not so found, to his son and daughter, without security.

Luxton, K.C., for the petitioners.

No one contra.

IRVING, J.:—Our sec. 27 is sec. 116 of the Imperial statute, with a slight alteration.

The practice in England seems to be to require security: see Elmer, p. 210.

In the appendix I observe that in nearly all cases the order contains a provision that security shall be made.

In a foot-note to Order 7 attention is called to the fact that neither undertaking nor security was referred to in the Order.

I infer from the fact that the learned author has seen fit to annex that note, that the usual course is to require an undertaking and security.

The fact that there is a close relationship between the applicant and the lunatic seems to make no difference: see form 14, where in the matter of a spinster, the applicant, a sister and the next of kin of the lunatic, was required to give an undertaking and security. And again, a brother in form

15. Form 16 is even more in point. There the application was made by the wife, a son, and two daughters of the lunatic, and an undertaking and security were ordered.

The practice under sec. 116 follows the rules relating to lunatics so found: Pope, p. 230; and the rule in those cases seems to require security unless there are special reasons shewn: Pope, p. 124; Encyc. of Eng. Law, vol. 5, p. 63. An undertaking is generally required when security not taken.

I see no reason for dispensing with the usual undertaking and security in this case.

BRITISH COLUMBIA.

(VANCOUVER.)

CLEMENT, J. NOVEMBER 14TH, 1907.

CHAMBERS.

ROBERT WARD & CO. LIMITED v. WILSON.

Attachment of Debts—Money Paid into Court by Garnishees —Payment out to Sheriff for Distribution under Creditors' Relief Act—Equality among Execution Creditors—Garnishing Creditors before Judgment—Costs.

Application on behalf of the plaintiffs, whose garnishing summons was served on 4th September, 1907, for payment out to them of the moneys in Court paid in by the W. H. Malkin Company Limited, garnishees. The junior garnishors resisted the order, on the ground that the Creditors' Relief Act applied, and the money should be paid to the sheriff to be distributed pro rata.

A number of actions were commenced against one George Wilson, and against George Wilson and George Howe, carrying on business as George Wilson & Company, and garnishing summonses before judgment were served on the W. H. Malkin Company Limited, who obtained an order allowing them to pay money into Court, which they did. Robert Ward & Co. Limited were the garnishors whose process had been first served, but, as they had signed judgment against George Howe only, they did not appear. Peter Scott, Fong

Lew, Alexander Morrison, A. T. Graham, Samuel Levy, and W. H. Lockley had served their garnishment proceedings on 4th September, and James Quinn and David Wilson had served theirs on 10th September, 1907.

Donaghy, for the senior garnishors.

Reid, for the junior garnishors.

CLEMENT, J.:—The moneys in Court should, I think, be paid to the sheriff to be held by him for distribution under the Creditors' Relief Act. That Act abolishes priority among creditors by execution from the Supreme and County Courts, and sec. 35 indicates how that principle is to be worked out in respect of that part of the debtor's assets which consists of debts due to him. That section, as Mr. Reid pointed out, does not consist of a main clause with subsections, but is really a group of sections dealing with this matter of attachment of debts. Clauses 2 and 3 seem to me to provide for every possible case, where the sheriff himself is not the moving party. The plaintiffs who ask here for payment out to themselves were, it is true, not judgment creditors when they obtained the original attaching orders, but that order becomes really operative in their favour only when they become judgment creditors. The debts attached were attached to answer the judgment to be recovered: sec. 3, Attachment of Debts Act; so that these plaintiffs fairly, I think, come within the phrase "any judgment creditor who attaches a debt" in clause 3 of sec. 35. Even if I am adopting a too benevolent construction of sec. 35, the fact remains that we have the legislative declaration abolishing priority among creditors by execution. The applying creditors here are not entitled ex debito to an order for payment out to them of the moneys in Court: see Martin v. Nedel, 75 L. J. K. B. 620; moreover, Vaughan Williams, L.J., lays it down in that case that garnishee proceedings are a process of execution. On this ground, therefore, I think I am justified in making the order I have indicated. But before the money is paid out to the sheriff, the costs of the applying plaintiffs and the plaintiffs at whose instance the fund is directed toward the sheriff's hands, should be taxed and paid out to those parties.

Order accordingly.

BRITISH COLUMBIA.

(VANCOUVER.)

NOVEMBER 14TH, 1907.

FULL COURT.

TAYLOR v. CITY OF REVELSTOKE.

Municipal Corporations — Health Act, R. S. B. C. 1897 ch. 91—Isolation of Infected Premises by Medical Health Officer—Liability of Municipal Corporation for Expenses of Maintaining Quarantined Premises and Inmates.

Appeal by defendants from the decision of FORIN, Co. C.J.

The plaintiffs kept a lodging house. A lodger on the premises was found infected with diphtheria, and the medical health officer placed a quarantine on the house and its inmates, among whom there happened to be at the time one of the plaintiffs, Mrs. Taylor. She did not usually reside in the house. Before and after the quarantine was placed, the patient was attended by his own physician. The medical health officer, although acting under arrangement with the city corporation, performed his duties under the provisions of the Health Act, and subject to the directions of the provincial board of health, to whom he reported all cases. The premises were purely for rooming purposes, without any facilities for culinary or similar housekeeping arrangements. There was some evidence that the medical health officer had promised to send in provisions, but he had not done so.

The County Court Judge gave judgment for the plaintiff for $191.45 out of a claim of $290, and the defendant corporation appealed.

J. Martin, K.C., for appellants (defendants). There is no liability attaching to the city. Plaintiffs' remedy is against the persons for whom they performed the services. There is no evidence that plaintiffs were directed by any quarantine or other officer of the city to do this work. The accident of infection brought about the quarantine, and quarantine necessarily entails loss on the parties concerned. People must have food and shelter when in quarantine, just

as at other times. If the city are liable for the claim made here, they would be equally liable to the parties for loss of time. The medical health officer is controlled in his duties by the provincial authorities, and therefore this is a matter of provincial law.

(He was stopped.)

W. A. Macdonald, K.C., for respondents, plaintiffs. The medical health officer is appointed by the city; he made use of plaintiffs' premises as a pest house; and if he turns a certain building into an isolation hospital, that implies carrying on a hospital. It is the duty of the city to provide a proper isolation hospital. There was no such building, and having used the one in question here, they are bound to meet the cost of maintaining it as such pro tem.

[IRVING, J., drew attention to an Act for the relief of Andrew Astrico, of Victoria, R. S. B. C. 1877 ch. 8.]

Per Curiam (HUNTER, C.J., IRVING and MORRISON, JJ.) :—There does not seem to be any ground upon which this judgment can be supported. The medical health officer acted under the general policy of the provincial statute, and, in the absence of any evidence of a promise by the municipality to indemnify the plaintiffs, it is difficult to see what remedy they have. Even if the council had indemnified them, in the circumstances, any ratepayer could recover the amount from the members of the council personally.

Appeal allowed.

BRITISH COLUMBIA.

(VANCOUVER.)

HUNTER, C.J. NOVEMBER 15TH, 1907.

TRIAL.

WILLIAMS v. HAMILTON.

Vendor and Purchaser—Contract for Sale of Land—Incomplete Contract—Offer—Qualified Acceptance—Agent—Representation of Authority.

Action for specific performance of a contract for sale of land.

Defendant Hamilton, who owned a lot in the city of Vancouver, instructed Forbes & Franklin, real estate agents,

to obtain offers to purchase and submit them to him. He then left for Montreal. Plaintiffs paid to these agents a deposit of $25 on a price of $1,400 for this lot. The agents gave a receipt for "$25 on account of purchase money of lot . . . $1,400, $950 cash, balance C. P. R., subject to owner's confirmation." They then wired Hamilton, "Have deposit on lot . . . $1,400; wire approval and instructions;" and received a reply, "Fourteen hundred O.K.; letter instructions." At the same time he wrote them saying he expected the $1,400 to be net to him, and that if this was satisfactory to them he would do business with them.

Macdonell and Brown, for plaintiffs.

Craig, Browne, and MacGill, for defendants.

HUNTER, C.J.:—In my opinion, this case against Hamilton may be disposed of on the short ground that there was no concluded agreement.

The receipt signed by the owner's agent, "subject to owner's confirmation," is merely a memorandum of an offer to buy the property for $1,400, of which $950 was to be paid in cash. It is elementary law that to have a binding contract the offer must be accepted simpliciter. The same day the owner's agent wired the owner as follows: "Deposit on lot . . . fourteen hundred; wire approval and instructions;" to which the following reply was received: "Fourteen hundred O.K., letter instructions." At this point it is clear that there is no concluded bargain, as the owner did not know how much was to be cash, nor did he know the other terms of the offer. There is, in short, only a statement that he assents to the only term of the offer which has been communicated, and is sending a letter of instructions. It appears that by the letter, which was not produced, he instructed the agents that $1,400 was to be net to him, but, if the acceptance simpliciter of the offer had been wired, the plaintiffs would have been entitled to a conveyance on payment of the $1,400, and the owner would have had to pay any commission himself.

There must, however, be judgment for the defendant Hamilton with costs; judgment must also go for the other defendants with costs, as it is clear that they never represented that they had authority to sell as the owner's agents, nor did they in fact assume to do so.

ALBERTA.

STUART, J. FEBRUARY 20TH, 1907.

CHAMBERS.

RE LOISELLE AND TOWN OF RED DEER.

Municipal Corporations—Motion to Quash By-laws—Proof of By-laws—Status of Applicant—Resident of Town — By-law Closing Lane or Highway——Gift or Bonus to Railway Company—By-law Passed in Interest of Company—Prejudice of Ratepayers.

An application to quash by-laws numbers 115 and 117 of the town of Red Deer, which purported to authorize the closing and selling to the Canadian Pacific Railway Company of a lane 20 feet wide at the rear of block 12, in the townsite of Red Deer, between the block and the railway right of way, the townsite trustees having previously reserved 46 feet from the rear of the lots in the said block for the purpose of making a 66-foot roadway, but having in the meantime made no improvements, and having subsequently sold the 46 feet to the railway company.

The application was made on the following grounds:—

1. That the by-laws expressly closed a lane and not a public highway, and the council of the respondents had only power or authority to close a public highway.

2. That the by-laws were ultra vires of the respondents, inasmuch as the council, by the statutes of Alberta of 1906, ch. 30, sec. 2, was only authorized to pass a by-law for closing and selling or leasing a public highway, and the said by-laws closed and made a gift of the land to the railway company.

3. That the by-laws were not passed in good faith in the interests of the public, but only in the interests of the railway company.

4. That the by-laws prejudicially affected the rights of the applicant and other resident ratepayers.

James Muir, K.C., and J. L. Crawford, for the applicant.

Greene, for the corporation of the town of Red Deer.

R. B. Bennett, K.C., for the Canadian Pacific Railway Company.

STUART, J.:—Neither of the preliminary objections can, I think, be sustained. The case of Butchart v. Brant and Carrick, 6 C. P. 130, relied upon in support of the first objection, as well as Re School Trustees of Sandwich, 23 U. C. R. 639, supports the contention that the by-law can be proved either under sec. 100 or under sec. 268. See judgment of Draper, J., in the former case, at the beginning of the last paragraph of p. 133.

The applicant swears he is a resident of the town of Red Deer, and this is not disputed. This is all that is required by sec. 268.

Upon the merits, I do not think the first objection to the by-law can be sustained. If no extraneous evidence had been given, there might be some ground for the objection; but, when we have once gone beyond the face of the by-law, it then becomes a question, to my mind, whether the strip of land in question was or was not in fact a highway. The land is sufficiently identified in the by-law. For obvious reasons the applicant did not take the position that it was not a highway; although, if he had done so, and if I could have accepted without reserve the evidence of Fulmer that no improvement had ever been done upon the land by the town, it is probable that the case would have come within the principle of Re Knudson and Town of St. Boniface, 15 Man. L. R. 317. In the circumstances, I think it better to deal with the question upon the assumption that the strip of land was a public highway.

I am of opinion that the second objection to the by-law must prevail. Whatever might have been the result if no extraneous evidence had been given, it is clear upon the facts that it was never intended that the railway company should pay even the sum of $1 for the land. I am strongly inclined to think that this erroneous statement of the consideration would be itself sufficient to invalidate the by-law. But, aside from this, I cannot bring my mind to the conclusion that there was any consideration at all. The strip of land was not mentioned in the agreement between the

railway company and the town; and, when we go beyond the agreement, it is clear from the letter of the superintendent of 27th February that the company did not intend to bind themselves to do anything in return for this land. To my mind it was a pure gift; and, as the town had no power under sec. 2 of the statute to give away their public highways, I am of opinion that the by-law is invalid on this ground. Even if there had been such consideration as was contended for, I doubt very much whether such a transaction, which is really in the nature of a bonus, could be held to be covered by the statute, which, I think, contemplates only a sale in the ordinary acceptation of that term.

I am of opinion also that the third objection should prevail, and this notwithstanding the opinion of Teetzel, J., in Re McLean and Town of North Bay, 7 O. W. R. 169. There is no doubt that the actual closing of the street was for the immediate benefit of the railway company, although, of course, the town council were thinking of the interests of the town in what they did; but I do not think that the closing of public highways should be made a matter of bargaining for advantages in the way of bonus with either railway or manufacturing corporations. I refer to the words of Moss, C.J.O., in Re Waterous and City of Brantford, 4 O. W. R. 355. If the legislature sees fit to give municipalities the power to grant a bonus in this way, as apparently has been done in Ontario, it of course is at liberty to do so; but until it does so, I think the idea of "public interests" should be confined to the direct and immediate question of the closing of the highway in itself, and not extended to indirect advantages which may be expected from the persons to whose individual interests it is to have the highway closed. The case of Re Inglis and City of Toronto, 9 O. L. R. 562, 5 O. W. R. 489, was decided upon a statute which allowed a bonus to be given in this way.

With regard to the fourth objection, I do not think it necessary or advisable to deal with it on this application, more than to say that, as far as the facts appear at present, it would apparently make a considerable difference to the applicant if, instead of having a 66-foot roadway between his land and the railway right of way, which he possibly was allowed to expect, he should find that the railway yard and side tracks came and abutted immediately upon the rear of his land. But I decide nothing upon this ground.

The by-law will, therefore, be quashed with costs.

ALBERTA.

STUART, J. MAY 9TH, 1907.

CHAMBERS.

RE WEIR AND CITY OF CALGARY.

Municipal Corporations—By-law Closing Lane and Authorizing Transfer to Private Person—By-law Passed in Interest of Transferee—Public Interest—Saving of Expense — Prejudice to Applicant — Consent of Land Owners—Construction of City Ordinance.

An application to quash by-law No. 721 of the city of Calgary, being a by-law authorizing the closing and transferring to one W. R. Hull of the westerly portion of the lane in block 87 running from 5th street on the east to 6th street on the west, between 12th and 13th avenues west, where the lane on both sides adjoined on the rear certain lots owned by Hull, who was the owner of the majority of the lots in the block, and the opening in lieu thereof of an outlet from the easterly portion of the lane, along the west side and adjoining certain lots owned by the applicant, upon which was the applicant's residence.

The by-law was passed under sec. 117, sub-sec. 72, of the Act incorporating the city, which was as follows:—

"117. The council of the city of Calgary may pass by-laws . . . ,

"(72) To open streets or lanes through any lands within the said municipality, upon receiving the consent of two-thirds of the land owners whose lands are affected by such openings, and to close or change streets or lanes or portions thereof now opened, upon receiving the consent of two-thirds of the owners of the land facing the street or lane or portion thereof proposed to be dealt with."

The application was made on the grounds that no sufficient consent and no consent of a sufficient number of the owners of land affected had been obtained; that the by-law was solely in the interest of Hull, and to the injury of the plaintiff and other owners of property in the block, and to that of the ratepayers of the city, and to the public in

general; and that no sufficient opportunity of being heard was given by the council of the city to those opposed to the proposed by-law.

It was argued in support of the by-law that the formation of the land made the use of the lane for traffic impossible, and that altering it to make it passable for such purposes would be very expensive.

James Muir, K.C., for the applicant.

John S. Hall, K.C. for the corporation.

STUART, J.:—I have been unable to avoid the conclusion that this by-law was passed entirely as a favour to Mr. Hull. On its face it is expressed to have been passed upon his application. In his letter to the council asking for the by-law he refers to the closing of the lane as a "privilege" which he is seeking. There is no affidavit from any member of the council, as was the case in Re Mills and City of Hamilton, 9 O. W. R. 733, setting forth the reasons which actuated them in passing the by-law. I feel sure that this would have been forthcoming if the reasons had been such as would tend to support the by-law. There is evidence, not contradicted, that at least two of the aldermen admitted that they would have opposed the by-law had they known of any serious objection on the part of other property owners. It is true that the city engineer makes an affidavit to the effect that he reported to the council that it was in the public interest to close the portion of the lane in question, but his only reason for giving this opinion is that some expense will be saved. There is no other reason seriously suggested, and I cannot attach much importance to the reason given. A lane in the rear of residential lots does not usually need to be converted into a well made public highway, as is suggested by the engineer. The evidence convinces me that it can be made fairly passable and useful for all the purposes for which a lane is generally used, at a comparatively inconsiderable expense. Besides, I doubt very much whether it has been the custom in Calgary to divert the course of alleys and lanes in the manner proposed in this case merely on account of rather trifling inequalities in the natural surface of the ground, such as those at the spot in question appear to me to be. It is, of course, in one sense in the public interest to save even a little money, but I am unable to believe that this desire for economy was the real motive inducing the

council to pass the by-law, especially in the absence of any statement from any of its members as to what their motive was. It is said that beautifying the city is in the public interest. But this is not even suggested as a reason for his report by Speakman (the engineer); and, again, I feel obliged to doubt very much whether this consideration appealed to the minds of the aldermen at all when the question came before them. I do not believe that it did.

The evidence that the council acted mainly in the public interest is, therefore, so slight, and the evidence that they acted merely out of favour to an individual is so strong, that I feel bound to adopt the latter view, in the circumstances; and this is, of course, necessarily fatal to the by-law. There may be no very great harm resulting to the applicant, but there is at any rate some slight reason for objection to the new lane passing so close to her windows. Where private favour is so manifest as the reason for passing the by-law, I do not think I should insist on any great disadvantage to the applicant being shewn. She and the others who support her have vigorously objected; and where public interest does not demand that the change be made, their wishes are entitled to as much respect as those of the party in whose private favour the by-law was passed.

I would also quash the by-law on another ground. I am of opinion that the whole lane between Fifth and Sixth streets is dealt with by the by-law. As it stands, the eastern portion of the lane leads to the western portion and dircetly out upon Sixth street. If the change were made, this eastern portion does not lead to Sixth street at all. It leads to Thirteenth avenue. This, in my view, clearly constitutes a "dealing with" the whole lane. That being so, the preliminaries required by sub-sec. 72 of sec. 117 of the City Ordinance have not been complied with. It is clear, to my mind, that the expression "two-thirds of the owners of the land" cannot be read to mean "the owners of two-thirds of the lots." The latter phrase is used in sub-sec. 73, and the distinction was evidently clearly understood by the legislature when the Ordinance was passed. It was under sub-sec. 72 that the council presumed to act; and, as two-thirds of the owners of the land facing the lane did not consent to this by-law, it is, therefore, invalid. Sub-section 22 was referred to; but, quite aside from the fact that it is apparent on the face of the by-law that the council acted under sub-

sec. 72, the latter sub-section is the subsequent one, and it repeats the powers given by sub-sec. 22, but imposes a limitation upon the exercise of them. In my opinion, these limitations or conditions must be complied with whenever anything provided for by the sub-section is attempted, even though sub-sec. 22 imposes no conditions. Otherwise, sub-sec. 72 would be entirely nugatory.

The by-law will be quashed with costs.

SASKATCHEWAN.

WETMORE, C.J. NOVEMBER 1ST, 1907.

CHAMBERS.

RE MORROW AND LINDSAY.

Arbitration and Award—Motion to Enforce Award—Submission—Matters in Difference—Jurisdiction of Arbitrators—Waiver—Acceptance of Award Made After Time Expired—Failure of Arbitrators to Enlarge Time.

Application by Morrow to enforce an award in his favour made by two arbitrators, Switzer and Neil. See 6 W. L. R. 386.

W. A. Nisbet, Moosomin, for Morrow.

H. Y. Macdonald, Moosomin, for Lindsay.

WETMORE, C.J.:—The objections to the affidavits have been cured in accordance with my judgment of the 4th July last (6 W. L. R. 386.) I will now proceed to deal with the merits of this application. The submission to arbitration was of all matters in difference between the parties. The award merely provides, after stating that the arbitrators had carefully examined all the matters in dispute between the parties referred to in a certain statement of claim in the Supreme Court of the North-West Territories between Morrow as plaintiff and Lindsay as defendant, that Lindsay should pay Morrow the sum of $770.75 forthwith, and that each party should pay his own costs, including $4 for rent of room. It was urged on behalf of Lindsay that the arbi-

trators did not award with respect to all matters in difference between the parties. It was not made to appear that there were any other matters in difference between the parties except that upon which the arbitrators awarded, and I am of opinion that if Lindsay desires to impeach the award he has to shew affirmatively that there were other matters in difference. This is borne out by what was laid down in Ingram v. Milnes, 8 East 445.

The submission was dated 18th July, 1905, and provided that the award should be made on or before 18th August of that year. As a matter of fact, the award was not made until 9th December, 1905. The submission, however, provided that the arbitrators might from time to time enlarge the time for making their award, by writing signed by them and indorsed on the submission. The arbitrators did not enlarge the time for making the award in this or any other way. They did put a writing on the submission to that effect after the summons on this application had been issued, and after the question was argued at the return of the summons. As a matter of course that served no purpose. But Lindsay, shortly after this award was made, signed the following, which was written at the bottom of the award: "I hereby accept above award and promise to pay same as agreed." This was signed on 24th January, 1906. I am of opinion that having signed this writing it does not lie in his mouth to set up that the arbitrators had no jurisdiction to make the award. That, I think, is in accordance with what was held in Tyerman v. Smith, 25 L. J. Q. B. 359. In that case the award ought to have been made within 3 months, and the time was not enlarged, but the parties attended by counsel before the arbitrators after the expiration of the 3 months without any objection, and it was held that they were estopped from setting up that the arbitrators had no jurisdiction to make the award. I see a distinction between that case and this; that is, Lindsay here did not, so far as the facts before me disclose, appear before the arbitrators after 18th August, nor does it appear that the arbitrators sat after 18th August, but the reasoning of the thing appears to me to be the same in both cases. This man, having accepted this award and promised to pay it, cannot now turn around and assert that the arbitrators had no jurisdiction. The application will, therefore, be granted with costs.

SASKATCHEWAN.

NOVEMBER 1ST, 1907.

FULL COURT.

MURRAY v. CANADIAN PACIFIC R. W. CO.

Railway—Animals Killed on Track—Railway Act, 1903, sec 237—Animals "at Large" through Negligence of Owner —Evidence—" Otherwise."

Appeal by defendants from the judgment at the trial, so far as in favour of plaintiff.

The action was brought to recover damages for the loss of 3 horses alleged to have been killed by one of the defendants' trains.

The trial Judge found that one of the animals was killed upon the defendants' property by one of their trains, and gave judgment as to that animal for the plaintiff. He found that the evidence did not establish that the other two animals were killed on the property of defendants, and awarded no damage in respect of them.

Allen, for defendants.

Wood, for plaintiff.

The judgment of the Court (WETMORE, C.J., PRENDERGAST and JOHNSTONE, JJ.), was delivered by

WETMORE, C.J.:—Assuming that the animal with respect to which the learned trial Judge found for the plaintiff was killed on the defendants' property and by their train, I am of opinion that the plaintiff is not entitled to recover.

This action can only be maintainable, if maintainable at all, under sec. 237 of the Railway Act, 1903. The first paragraph of that section provides that "no horses, sheep, swine, or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail-level, unless such cattle are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway."

The second paragraph provides for impounding cattle found at large contrary to the provisions of the section.

Paragraphs 3 and 4 are as follows:—

"3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured. . . . .

"4. When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover."

The horses in question were herded by the plaintiff in the daytime about one mile and a half from Regina, and at night they were brought by the plaintiff and placed in what he calls a "corral," bounded on the south and west sides by a fence, and on the east by a creek; on the north it was not closed in in any way. The manner in which they were placed in this so called corral at night was by driving them over the creek, and they were taken out in the same way next morning. It was said that in order to get them across this creek it was necessary to break the ice. Horses had been placed in this "corral" for a long period, and had never prior to the occasion in question got out. The plaintiff shortly before this occasion had purchased a number of Montana horses and put them there. In fact, the larger portion of the horses of the plaintiff were these Montana horses. Somewhere between the 12th and the 18th, a very severe snow storm arose, and the animals got out and got into the immediate vicinity of the railway track and on or about there. No person was herding them, and the animals were undoubtedly "at large," in the ordinary sense of the words. Now the question arises whether they were so at large through

the negligence or wilful act or omission of the owner, because there was no other agent or custodian of the animals. Prior to their getting at large, they had been placed in the corral that I have mentioned, without any person to look after them to prevent them going at large, and they got at large by getting out of it. I am of opinion that they were at large through the wilful omission of the plaintiff. There is no affirmative evidence as to how they got out of this place where they were put at night, but the reasonable conclusion is (in the absence of any evidence to the contrary) that they got out either by the north, where there was no fence, or across the creek. There was nothing to prevent these animals getting out in either one of these ways. Of course, the north having no obstruction of any kind, they could easily get out there, and I can see nothing in the evidence to establish that this creek over which these horses had been driven regularly twice a day for some days would prevent them getting out that way. The fact tnat they had not got out before seems to me to be no reason why they could not and did not get out on the occasion in question. There is no evidence that any of the fence was broken down, and it seems to me that it is as reasonable to assume that these horses went out the way they could have readily gone out as it would be to assume where a number of horses were put in a fenced field and a panel of that field was left down, and the horses were missing, that they went out through that panel, there being no evidence that they could readily have got out any other way.

Now in this country, as elsewhere, railways have been built and are in operation, and they are a source of danger to cattle and horses running at large. The statute does not intend that the railway companies shall be insurers against any accident that may occur by reason of their trains. Some duty is cast upon the owner of all animals that are likely to be placed in danger by reason of these trains; they are to take reasonable precautions to prevent them getting at large, so that accidents may not happen to them, and, if they do not take such precautions, and accidents happen to such animals, the owner has got to abide by the consequences. I think the plaintiff in this case did not take the precautions that a reasonable man would take under the circumstances. In fact, I might say that, in my judgment, he took no precautions at all. He might as well have turned

the animals loose on the open prairie. I consider the putting the animals in such a place, without its being properly enclosed, and without any person to look after them, a wilful omission, within the meaning of the section of the Act under discussion. There was no evidence of any negligence on the part of the company.

Some question has been raised by the authorities as to the meaning of the word "otherwise" at the beginning of paragraph 4 of sec. 237. This paragraph commences as follows: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed."

I am of opinion that the word "otherwise" means any cattle or animals at large upon the highway or upon other places than the highway, as, for instance, if they were at large upon prairie land which is not a highway.

I am of opinion, therefore, that the judgment of the learned trial Judge should be reversed, and judgment entered for the defendants in the Court below, with costs, and that the plaintiff should pay the defendants' costs of this appeal.

ALBERTA.

SCOTT, J. NOVEMBER 7TH, 1907.

TRIAL.

REVILLON BROTHERS LIMITED v. DEROME.

Fraudulent Conveyances — Properties Purchased by Trader and Conveyances Made to Wife—Embarking in Hazardous Business—Intent to Defeat Creditors—Declaration—Evidence.

Plaintiffs, suing on behalf of themselves and all other creditors of the defendant Octave Derome, alleged that that defendant was indebted to them in the sum of $2,-361.09 and interest in respect of the causes of action set out in the statement of claim, and they sought in this action a judgment against him for the amount of their claim; they also alleged that lot 32, block 4, river lot 14, in the city

of Edmonton, of which the defendant Louisa Derome, the wife of the defendant Octave Derome, was the registered owner, and lot 31 in the same block, of which she was entitled to be registered as owner, were purchased by her husband in her name and the buildings erected thereon for the purpose of defeating, delaying, and hindering the persons who might become his creditors in the course of his business, which they both knew was a hazardous one, and in which the husband was in danger of incurring large liabilities which he might be unable to pay from the profits thereof; and they sought a declaration that the lots were so purchased and the buildings erected for that purpose, and that the same were exigible for the claims of the plaintiffs, and the other creditors of the defendant Octave Derome.

C. F. Newell, for plaintiffs.

A. F. Ewing and Lucien Dubuc, for defendants.

SCOTT, J.:—In his evidence at the trial the defendant Octave Derome admitted his indebtedness to the plaintiffs in the amount claimed by them. I therefore give judgment for the plaintiffs against him for $2,598.09.

Defendant Octave Derome in 1902 was the owner of a homestead near Fort Saskatchewan, upon which he in that year obtained a loan of $1,000. A portion of the proceeds of that loan, viz., $558, was standing to his credit in the Imperial Bank at Edmonton, but on that day he withdrew the whole amount, and shortly afterwards went east to Montreal. On his way there he was married at Winnipeg, and his wife accompanied him to Montreal. When there he purchased goods to the amount of $225 or $250, and in the spring of 1903 he started business with a stock of about $700. He sold his farm about May, 1903, and received therefrom $900 over and above the amount of the mortgage thereon. This money was given by him to his wife, as he says, to keep for him. Defendants both admit that a portion of it was expended in payment for the buildings upon lot 32, but they assert that some of it was expended in payment of goods for the store. Derome began dealing with the plaintiffs about August, 1903, and thereafter, so long as he continued in business, he bought almost exclusively from them. He appears to have been continuously indebted to them from that date. Derome states that when he began business his stock of $700 was practically

all paid for. This must be incorrect, as it appears that all the money he had at that time with which to buy goods was what was left of the $558, after deducting the expenses of himself and wife to Montreal and return. He did not sell his farm until some months afterwards.

Lot 32 was purchased from one Brown in the spring of 1903 for $1,250, and the transfer from him was taken in the name of Mrs. Derome. Brown states that the negotiations for the purchase were conducted by Mrs. Derome, but he admits that Derome spoke to him several times about it, and the latter admits that he told Brown that his wife wanted to buy the lot. Both defendants state that when they were in Montreal together in the fall of 1902, Derome's sister, Mrs. Belliveau, lent Mrs. Derome $300, and that the purchase money was paid out of this loan. It appears from the evidence that if any such loan was made, it has never been repaid.

A building was erected upon lot 32 in the spring of 1903 at a cost of about $1,300, which was partly paid for out of the proceeds of a mortgage loan of $1,000 upon it, obtained by Mrs. Derome. Derome carried on the store business on the ground floor, the upper storey being occupied by them as a dwelling-house.

For some 3 years after they went into occupation of it they kept a boarding-house there, which was supplied with goods from the store. Mrs. Derome managed it, but paid over the proceeds to Derome, retaining $20 per month, which they state he agreed to allow her for her services. They also state that he agreed to pay her $15 per month for the store, and that this amount was paid by him on the monthly instalments due on the mortgage.

Lot 31 was purchased in April, 1903, from one Killear. It was bought through one Vellat, who appears to have advanced the purchase money and acquired the property in his own name, and to have entered into an agreement with Mrs. Derome to sell to her for that amount, payable at the expiration of 3 years, with interest at 10 per cent. per annum, payable half yearly. Vellat states that both defendants were present when the bargain was made; that Derome did some talking, but that Mrs. Derome made the bargain. The purchase money was paid in one sum on 16th April, 1906.

In the spring of 1906 a building was erected on lot 31 at a cost of $2,400. It would appear, though not clearly shewn, that Mrs. Derome about that time obtained a mortgage loan of $3,000 on both lots, paying thereout the balance of about $600 then remaining unpaid upon the mortgage upon lot 32.

The store business carried on by Derome appears to have been carried on at a loss from the first. In March, 1906, he sold by auction the remainder of his stock, which then amounted to about $1,200. The amount realized from the auction sale was about $370. It is a significant fact that it was shortly after that auction sale that the purchase money of lot 31 was paid.

Derome did not at any time keep a bank account in his own name. Up to December, 1903, all moneys received on account of the business were deposited in the bank to Mrs. Derome's credit, and were chequed out by her. The balance of the purchase money of the homestead, amounting to about $800 or $900, was also deposited to her credit. He states that his reason for handing that balance over to her was that he did not want to keep two bank accounts, while she states that his reason for so doing was that he was afraid that he would spend it. No reason is given why at the time when he was about to begin business the bank account of the business was opened in her name, and, if he was afraid to trust himself with his own moneys, it is singular that he should have continued the management of his business and the receipt of the moneys arising therefrom. After December, 1903, no bank account was kept by either of the defendants, and thereafter Derome appears to have himself received and paid out all moneys received on account of the business.

The statements of the defendants as to the loan obtained by Mrs. Derome from Derome's sister, the circumstances under which they assert it was obtained, and the fact that they admit that it has never been repaid, leave it to my mind open to serious doubt whether any such loan was ever made. Both defendants state that the amount of the loan was $300. Derome states that after paying Brown the purchase money of lot 32, amounting to $125, the balance of $175 went into the building thereon, while Mrs.

Derome states that she paid $125 on the lot, lent her brother $50, and does not remember what became of the balance, but she thinks she spent it. It is difficult to understand why Derome's sister should have made such a loan to his wife immediately after her marriage. No explanation is given as to the object of the loan. Derome was at that time apparently free from debt, and had some money and property. His wife could not have been in need of money. It is true that Derome was about to embark in a business which would doubtless employ all the available capital, but, if the advance was made for that reason, it is reasonable to assume that it would have been made to him and not to his wife.

The amount actually expended upon the properties in question is shewn to be $1,282, made up as follows:—

Purchase money of lot 32	$ 125
Cost of building thereon	1,300
Purchase money of lot 31, $275, and 3 yrs'. int.	357
Cost of building thereon	2,500
	$4,282
Less balance of proceeds of mortgage loans	3,000
	$1,282

all of which, with the exception of the first item of $125, came out of the business carried on by Derome, in respect of which his indebtedness to the plaintiffs was incurred, and, as the purchase money of lot 31 was not paid until 3 years after, he had begun to deal almost exclusively with them. The probability is that it was paid out of the proceeds of the sale of their goods.

The business which Derome was about to enter into at the time lot 32 was acquired would, under ordinary circumstances, be considered a hazardous one. It was in his case rendered extra-hazardous by reason of the fact that he was entirely without training or experience in mercantile business, his occupation up to that time being that of a printer.

I cannot avoid the conclusion that the properties in question were purchased with the moneys of Derome, and

that they were acquired by him in his wife's name in order that if the business should meet with disaster, they would be beyond the reach of future creditors to whom he might become indebted in the course of it.

It was, however, contended on behalf of the defendants that even if such were the case, the circumstances under which the purchases were made do not bring them within the class of cases which avoid as against subsequent creditors settlements made by persons on the eve of entering into a hazardous business.

The principles laid down in MacKay v. Douglas. L. R. 14 Eq. 106, Buckland v. Rose, 7 Gr. 440, and Johnston v. Kline, 16 O. R. 129, where similar settlements were avoided, appear to me to be peculiarly applicable to this case. It is true that the original price of the lots in question constituted only a small proportion of the assets of Derome at that time, but it must not be forgotten that a sum of about $900, which constituted the bulk of his assets, was transferred by him to his wife about that time, and, in my view, with the same intent.

I hold that the plaintiffs are entitled to a declaration that the lots mentioned in the statement of claim were purchased by the defendant Octave Derome, and the buildings thereon were erected by him; that said lots were acquired by him in the name of the defendant Louisa Derome for the purpose of hindering, delaying, and preventing the plaintiffs and other creditors of the defendant Octave Derome in the recovery of their just claims; and that the said lots and buildings are exigible for such claims.

Plaintiffs to have their costs of the action.

Defendants counterclaimed, but it was agreed by counsel that the trial of the counterclaim should stand over until after judgment upon the plaintiffs' claim.

ALBERTA.

SCOTT, J. NOVEMBER 7TH, 1907.

CHAMBERS.

NEWLANDS v. HIGGINS.

Chattel Mortgage — Validity — Bills of Sale Ordinance — Advances to Mortgagor to Enable him to Carry on Business — Period of Liability — Computation of Years — Agreement for Advances—Recital—Estoppel—Company —Affidavit of Bona Fides—Vice-President—Agent—Extent of Liability—Price of Goods Supplied—Promissory Notes.

Summary trial of interpleader issue.

C. F. Newell, for Newlands & Co. and E. N. Harvey & Co., execution creditors.

J. R. Boyle, for Hollingshead & Co., execution creditors.

C. A. Grant, for the Great West Saddlery Co., claimants.

SCOTT, J.:—On 15th October last the sheriff of the Edmonton judicial district applied for an interpleader summons in respect of the claimants' claim; all parties being then represented, it was agreed by counsel that the matter should be dealt with as if a summons had been issued and was returnable, and that the claimants' manager at Edmonton should be examined as if the claimants had filed an affidavit in support of their claim.

The parties appeared before me, and it was then agreed that the matter of the claim should be disposed of by me under Rules 440 and 441.

The claimants claim under a chattel mortgage made by the execution debtor to them, under the provisions of sec. 8 of the Bills of Sale Ordinance, R. O. ch. 431, to secure future advances to be made by them to him.

The only objections raised by the execution creditors to the claim were as to the validity of the chattel mortgage. These I will now deal with in their order:—

1. That it does not shew that the advances provided for were for the purpose of enabling the mortgagor both to enter into and carry on business.

Section 8 provides for the taking of a mortgage for future advances, in case of an agreement in writing for the same to enable the borrower to enter into and to carry on business.

In the present case not only does the mortgage omit to state that the advances were for both those purposes, but it also appears from the evidence that the mortgagor had been carrying on the business for a long time before the date of the mortgage, and therefore the advances could not have been made for the purpose of enabling him to enter into business.

In Goulding v. Deeming, 15 O. R. 201, it was held that, under a similar provision in the Ontario Chattel Mortgage Act, it was not essential to the validity of such a mortgage that the advances should be made for the purposes of enabling the mortgagor to enter into business as well as to carry it on. I see no reason why I should not follow that case.

2. That sec. 8 provides that the liability under such a mortgage shall not extend beyond two years from its date, and that this mortgage shews that a longer period of credit was provided for.

The morgage is dated 8th February, 1907, and the time fixed for repayment is 8th February, 1909.

Elliott v. Gladstone, 4 C. L. T. 405, and Quirk v. Thompson, 1 Terr. L. R. 159, cited by counsel for the execution creditors, do not support this contention. On the contrary, the latter case seems to hold that in computing the two years, the day of the date of the mortgage should be excluded. I therefore overrule this objection.

3. That there was no agreement in writing, as provided by sec. 8.

The mortgage recites such an agreement, and counsel for the execution creditors admitted that the cases shew that where a mortgage is made to an individual, who himself makes the affidavit of bona fides, it would be sufficient if the agreement were recited in the mortgage, as he would by making the affidavit be bound by the recital.

He, however, contends that that rule will not apply to the present case, as the mortgage is made to an incorpor-

ated company, which has not executed it, and the affidavit of bona fides is made merely by one of its officers or agents.

The mortgagees have branch stores both at Edmonton and Calgary. One Studholme, who is the manager at Edmonton, conducted the negotiations with the mortgagor which led up to the agreement and the giving of the mortgage. The affidavit of bona fides is made by one Hutchings, who is therein styled vice-president of the company, but he is shewn to be also the manager of the Calgary branch.

I think it may reasonably be assumed that it was within the powers of the manager of the Calgary branch to bind the company by an agreement entered into by him to supply goods to the mortgagor. It is true that the agreement was made in the first instance by the manager at Edmonton, but there is no stipulation in the agreement that the goods should be supplied from the store there. The agreement on the part of the company would be performed if it supplied goods from any of its stores.

I think, therefore, that, if the making of the affidavit of bona fides by a mortgagee in person will render the recitals in the mortgage binding upon him, the making of such an affidavit by the agent of a company mortgagee, who is authorized to make such an agreement, will have a similar effect.

4. That the affidavit of bona fides is not made by a person authorized by the Ordinance to make it.

Section 22 provides that, for the purpose of making the affidavit of bona fides required by sec. 8, the expression "mortgagee" shall, in addition to its primary meaning, mean and include the agent or manager of any mortgagee being an incorporated company.

I have shewn that Hutchings, who made the affidavit, is both vice-president and an agent of the mortgagees, and that he was made aware of the terms of the agreement proposed to be entered into.

The fact that he is in the affidavit styled vice-president will not, in my opinion, preclude the company from asserting that he was their agent in the matter.

5. That the affidavit of bona fides should allege that the liability was not to exceed a certain sum.

Section 8 expressly states what the affidavit shall contain, and that is not one of its requirements.

Keough v. Price, 27 C. P. 309, cited in support of the objection, does not appear to me to bear upon the question.

6. That the true consideration is not expressed in the affidavit of bona fides.

Counsel for the execution creditors referred to the examination of Studholme as supporting this objection. I can find nothing in that examination to lead to the suspicion that the consideration was otherwise than as expressed in the mortgage.

7. That the price of certain goods supplied by the company before the date of the mortgage was included, with that of others supplied under the mortgage, in certain promissory notes given by the mortgagor.

I intimated at the trial that this fact or the fact that the goods supplied before and after the mortgage were kept in one account would not affect the validity of the mortgage, and that the only effect would be that an account might have to be taken to ascertain what goods were supplied under the mortgage.

I hold that the goods mentioned in the chattel mortgage from the execution debtor to the claimants were at the time of such seizure the property of the claimants as against the execution creditors.

The claimants to have their costs of the interpleader proceedings, to be paid by the execution creditors. The sheriff's costs of the application to be paid by the execution creditors.

SASKATCHEWAN.

NOVEMBER 9TH, 1907.

FULL COURT.

KEW v. WATT.

Pleading—Statement of Claim—Summary Application to Strike out, as Disclosing no Reasonable Cause of Action and as Frivolous and Vexatious—Rule 151—Question of Law Raised as on Demurrer—Construction of Rule.

The plaintiff having brought an action to have the Court set aside an assignment from Watson & Kilgour to the de-

fendant as preferential, the latter, after appearing, took out a Chambers summons to dismiss the action, on the ground that the statement of claim disclosed no reasonable cause of action and was frivolous and vexatious.

Upon the return of the summons before NEWLANDS, J., the reasons argued in support thereof were:—

1. That, although containing the statement that "the plaintiff is an execution creditor of Messrs. Watson and Kilgour" (which would refer to the time of the institution of the action), the statement of claim does not distinctly allege that the plaintiff was such a creditor at the time of the transaction complained of.

2. That it is not alleged that the plaintiff was injured, delayed, prejudiced, or postponed by the assignment.

NEWLANDS, J., held that the statement of claim was good without the allegation that the plaintiff was a creditor at the time of the assignment, and discharged the summons with costs.

The defendant appealed to the full Court, upon the same grounds.

H. V. Bigelow, Regina, for defendant.

J. F. L. Embury, Regina, for plaintiff.

The judgment of the COURT (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

PRENDERGAST, J.:—The Court is of opinion that the summons was rightly discharged. This opinion is not formed, however, on the ground of the point of law decided by the learned Judge—a decision which the Court at this moment does not feel called upon to either concur in or dissent from—but solely on the ground that Rule 151 of the Judicature Ordinance, under which the summons was taken out, providing for the striking out of any pleading, on the ground that "it discloses no reasonable cause of action or answer," or "is frivolous or vexatious," is not intended to cover such a case as the present one.

The point raised in this matter by the appellant is a point of law, and the factums and lengthy argument before this Court shew it to be an intricate one, making it necessary to define the scope of the Statute of Elizabeth and our Assignments and Preferences Act, to determine

the extent to which the former Act is superseded by the latter, and to ascertain the general bearing of the Creditors' Relief Act on the whole.

A point of law may undoubtedly be raised under Rule 151; but the use of the words "a reasonable cause of action" and "frivolous or vexatious," shews that it should not be one involving elaborate research and a nicety of distinctions such as the present one would call for.

Even leaving aside the wording of the Rule, the summary proceeding of an application by way of Chambers summons is not, in its nature, well fitted for the presentation and determination of such complex or elaborate questions; and the appellant has, moreover, at his disposal the remedy which he seeks in Rule 149, which allows him to raise in his defence any point of law, and provides for the determining of the same either before, at, or after the trial.

The view now expressed is in accord with a decision of the late Supreme Court of the North-West Territories in McEwen v. North-West Coal and Navigation Co., 1 Terr. L. R. 203. This was an appeal to the Court en banc from an order by McLeod, J., striking out the statement of claim under Rule 125 of the Judicature Ordinance, ch. 58 of R. O. 1888, which is in the same words as Rule 151 of our present Ordinance. In delivering the judgment of the Court allowing the appeal, McGuire, J., said: "It seems to me that there is an important distinction between 'no cause of action' and 'no reasonable cause of action;' the word 'reasonable' must, I think, mean something, and, in my opinion, it means a cause of action which may or may not turn out to be a good cause of action, but which is at least reasonable or probable—one which is not clearly bad."

This seems also to be on the lines of the practice in Ontario. In Glass v. Grant, 12 P. R. 480, Boyd, C., said: "As a general rule, a Judge should be chary as to striking out defences on summary applications unless so plainly frivolous or indefensible as to invite it. When a matter is doubtful or difficult, it is better to leave the party to demur."

The English Rule—being Order 25, Rule 4—from which Rule 151 of our Ordinance is copied word for word, is interpreted in the same way by the Courts in England.

In Hubbuck v. Wilkinson, [1899] 1 Q. B. 91, Lindley, M.R., said: "Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order XXV., Rule 3" (which corresponds to our Rule 139). "The other is to apply to strike out the statement of claim under Order XXV., Rule 4. The first method is appropriate to cases requiring argument and consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression 'reasonable cause of action' in Rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases."

In Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 495, Chitty, L.J., said with respect to the same Rule: "Obviously some meaning must be assigned to the term 'reasonable.' Under the new Rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented, the Court should, I think, decline to strike out that pleading."

In Boaler v. Holder and others, 54 L. T. 298, which was also an appeal from an order striking out the statement of claim, Mathew, J., while expressing the opinion that the plaintiff did not appear from the statement of claim to have received any real or substantial damage for which he could recover compensation, added: "But that is not a matter which can be said to authorize the Court to strike out this statement as disclosing no reasonable cause of action."

In Worthington v. Bell, 18 Times L. R. 438, an appeal was taken by the defendants from an order made by a Judge in Chambers reversing an order of a Master, who had struck out the statement of claim under the same Rule, as disclosing no reasonable cause of action—the question raised being whether, under the statute governing the case, it was essential that a certain representation alleged in

the statement of claim to have been made verbally, should have been made in writing. After Romer, L.J., had delivered judgment to the effect that the appeal should be dismissed, Mathew, L.J., said that he agreed; that he could not imagine a more objectionable mode of procedure in such a case as the one before the Court; that it had all the vices of the old demurrer; and that the proper course in such a controversy was to raise the question in a proper way and not by what amounted to a special demurrer.

The decisions are abundant and clear and seem to settle this point of practice beyond any possible doubt.

As the present conclusion is reached merely from the nature of the grounds set forth in the summons and not on their merits, it cannot, as already stated, have any bearing one way or the other on the finding of law made by the learned Judge. In order, however, that no doubts should arise as to the effect which this decision is intended to have, it will be advisable that the appellant be expressly granted leave to raise again in his defence the grounds already raised in the summons.

The reasons upon which the Court rests its judgment having in no way been urged or referred to by the respondent, there should be no costs.

The appeal is dismissed, with leave to the appellant as above stated.

SASKATCHEWAN.

NOVEMBER 9TH, 1907.

FULL COURT.

PARKIN v. PARKIN.

Attachment of Debts — Garnishing Summons before Judgment—Nature of Plaintiff's Claim—Rule 384—"Debt or Liquidated Demand"—Claim for Necessaries Supplied to Defendant's Wife and Daughter.

The original statement of claim alleged that the defendant was indebted to the plaintiff for board, lodging, clothing, medical attendance, and other necessaries, supplied

by the plaintiff to the defendant's wife Deborah and to his daughter Jennie, at the defendant's request. The plaintiff took out a garnishee summons against Messrs. Ross & Bigelow, which was duly served. The action was commenced on 16th March, and the garnishee summons was taken out on the 22nd of that month. The defendant filed a defence on 16th April, and on 3rd May the plaintiff filed an amended statement of claim, in which he set out that the defendant and his wife Deborah and his daughter Jennie for some years prior to 1893 resided on township 17, range 21, west of second medidian, and that about the month of February in that year the defendant abandoned his home and his wife and daughter, without any default on the part of either of them, and left them without any means of support or of earning a livelihood, and the plaintiff's claim against the defendant was for necessary board, lodging, clothing, and medical attendance supplied to Deborah and for necessaries supplied to Jennie at the defendant's request, and also at the request of Deborah as agent for the defendant, Jennie being both mentally and physically unable to care for herself. The defendant filed an amended statement of defence on 8th May, to which a reply was filed. On 12th July the defendant took out a summons to set the garnishee proceedings aside. This summons came on for hearing before NEWLANDS, J., who discharged it with costs, and defendant appealed to the full Court.

Allen, Regina, for defendant.

Casey, Regina, for plaintiff.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, J., JOHNSTONE, J.), was delivered by

WETMORE, C.J.:—There were 4 grounds of appeal set out in the notice, but the defendant was confined to one only, and that is whether the plaintiff's claim was a debt or liquidated demand within the meaning of Rule 384 of the Judicature Ordinance.

I am very clearly of opinion that it was. It is a well understood principle of law that if a husband turns his wife out of doors or abandons her so that she is not able to support herself, she is entitled to pledge his credit for necessary supplies. The authorities on the subject will be found

collected in the note to Manby v. Scott, 2 Sm. L. C., 11th ed., p. 497. And in Debenham v. Mellon, 6 App. Cas. at p. 31, Lord Selborne, dealing with the question whether the mere fact of marriage implies a mandate by law making the wife the agent of her husband to bind and pledge his credit, lays down as follows: "On that point I think it enough to say that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her." And in Bennett v. Jones, 4 Allen (N.B.) 397, Ritchie, J., at p. 400, dealing with the principle upon which the liability of the husband arises in such cases, states that the liability arises "on a contract . . . made by the wife on behalf of the husband by virtue of an authority in law whereby she is authorized from necessity to contract on her husband's behalf:" and that learned Judge cites very freely from what was laid down by Pollock, C.B., in Johnston v. Sumner, 3 H. & N. 261. It would seem from these cases, therefore, that the liability is simply a contractual one raised in favour of the parties furnishing the supplies against the husband, by virtue of his having created his wife his agent from necessity to pledge his credit, and therefore the liability would be, in so far as the question we are now discussing (namely, whether it is a debt or liquidated demand) is concerned, the same as if the husband had contracted the debt himself or by any recognized agent. It stands in the same position as a storekeeper's account. The cases cited by the defendant with a view of shewing that this was not a debt or liquidated demand are cases where the Courts in England, under certain circumstances, held that a claim for interest was not a debt or liquidated demand, because they held interest to be in the nature of damages under the circumstances. I never heard it contended for a moment that a storekeeper's account was not a liquidated demand. A claim of this character at any rate is a debt in the ordinary meaning of the word, and it seems to me that that in itself would be sufficient to fill the words of the Rule. It is a claim upon which an action of debt in the old form would lie. It would also have been recoverable under the common indebitatus accounts in assumpsit under the old

form of practice. To hold that a claim of this sort is neither a debt nor a liquidated demand would seem to me to practically destroy the utility of the legislation respecting attachment before judgment altogether.

In my opinion this appeal should be dismissed with costs.

SASKATCHEWAN.

NOVEMBER 9TH 1907.

FULL COURT.

RE BAKER.

Assessment and Taxes—Tax Sale—Confirmation—Time for Redemption — Statutes — Retroactivity — Amendment —Administrator ad Litem—Costs.

Appeal by John Baker from order of NEWLANDS, J., in Chambers, discharging a summons obtained by the appellant under the Land Titles Act.

Ross, for appellant.

Thom, for respondent.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

WETMORE, C.J.:—This was an application on behalf of John Baker to bring the most southerly fifteen-sixteenths of lot No. 15 in block 287, in the city of Regina, under the operation of the Land Titles Act, and to confirm the sale to Baker by the city of Regina of such lot for arrears of taxes. The application was, under the provisions of sec. 64 of the Land Titles Act, referred to Newlands, J., who granted a Chambers summons in the matter.

The abstract of title shewed that according to the registry the ownership of the land in question was in one John Frederick Snow. Snow has been dead some years, and it seems that no administration has been taken out to his estate. Mr. Norman MacKenzie, the public administrator, was appointed by the Chief Justice of the North-West Territories

administrator ad litem, and authorized service of summons to be made upon him. Mr. MacKenzie appeared at the return of the summons by counsel. No person other than Snow appears by the registration to be interested in the estate. When the summons was called on for hearing at the return Mr. McMorran appeared for the respondent and stated that his client desired to redeem. The hearing was then adjourned, and at the adjourned hearing Mr. Thom appeared for Mr. MacKenzie, and again stated that his client desired to redeem, and the argument was then proceeded with.

The tax sale under which the applicant claims was made on 1st October, 1890, and the transfer was executed by the treasurer of the town on 6th October, 1891. No question was raised as to the regularity of the sale and transfer. The sale was made under the Municipal Ordinance (R. O. 1888), secs. 224 et seq. That Ordinance contains no provision vesting the title to the land in the purchaser upon the transfer being executed, such as is contained in the School Ordinance of that date. That, however, to my mind, is not material because the Supreme Court of the North-West Territories held in In re St. John School District No. 16, in a judgment delivered on the 2nd June, 1903, that sec. 2 of Ordinance ch. 12 of 1901 was retroactive, and the Supreme Court of Canada on the appeal from that decision (North British Canadian Investment Co. v. Trustees of St. John School, 35 S. C. R. 461), held also that such section was retroactive so as to cover the then appellant's interests. By Ordinance ch. 9 of 1903 (1st session) sec. 2 of the Ordinance ch. 12 of 1901 was amended by striking out the word "for" where it occurs therein and substituting the word "of" therefor. The section as so amended now reads: "Any person interested in such land may, at any time before the time of hearing such application, redeem the said land by paying to the purchaser or his assignee the amount of the purchase money paid and any further sums charged against the said land and lawfully paid, together with 20 per cent. thereon, and such costs as the Judge may allow." And a new sub-section was added by the Ordinance of 1903 as follows: "Upon the return of any summons granted under the provisions of section 1, if it is made to appear to the Judge that any person who is entitled and desirous to redeem the said land has

been unable to do so because of his inability to ascertain the proper amount to be paid to redeem the said land, the Judge may adjourn the hearing of the said application and may order an account to be taken, or may give such other directions as to him shall seem meet."

The first question that arises is: what is meant by the ammendment substituting the word "of" for "for." The only construction I can put upon it is that a person interested, instead of redeeming the land before the time appointed for the hearing by the summons, may redeem before the time at which the matter is actually heard. It seems to me to be very plain that the section intends that the party wishing to redeem must do so before the time of the actual hearing, unless he brings himself within the provisions of the sub-section which was added as above stated. In this case Mr. MacKenzie did not redeem before the hearing, nor to my mind did he bring himself within the provisions of the sub-section. There must either be an actual redemption before the hearing or there must be circumstances to make it apparent to the Judge that the person entitled to redeem has been unable to do so because of his inability to ascertain the proper amount to be paid, and then the Judge may adjourn the hearing and order an account to be taken or give directions. That state of things was never made apparent to the Judge, so far as the appeal book shews. Mr. MacKenzie simply applied to a Judge stating that he desired to redeem—that is not sufficient. This is not at all at variance, in my judgment, with the decision of the Supreme Court in the case which I have cited. That Court evidently considers sec. 2 of the Ordinance of 1901 intra vires, because Davies, J., who delivered the judgment of the majority of the Court, lays down the following, at p. 475: "I think the Ordinance of 1901, i.e., ch. 12 of 1901, under which these confirmation proceedings were taken, was clearly retroactive so as to cover the appellant's interests." This must have had explicit reference to sec. 2, and, to my mind, indicates that the learned Judge considered that section intra vires. It was the 4th section of the Ordinance that the Court held to be ultra vires. Section 2 being intra vires, I can see no reason why the amendments of 1903 are not also intra vires. I do not hold that the transfer is conclusive under sub-sec. 2 of sec. 4 of the Ordinance of 1901; I merely hold that Mr. MacKenzie did not come

promptly to redeem the land, as provided by sec. 2 of that Ordinance, as amended by the Ordinance of 1903, and he gave no reason for not doing so.

I am of opinion, therefore, that the appeal should be allowed, the judgment of the Judge below be set aside, and an order made confirming the sale to the applicant Baker, and the registrar be directed to cancel the certificate of title to Snow and issue a new certificate of title to the applicant, Baker. Snow being dead, and there being no fund that I am aware of out of which Mr. MacKenzie can pay costs, and he being merely the officer appointed by the Court, I am of opinion that this appeal should be allowed without costs, and the sale to John Baker confirmed.

ALBERTA.

SCOTT, J. NOVEMBER 11TH, 1907.

CHAMBERS.

WEDIN v. ROBERTSON.

Discovery—Examination of Party—Relevancy of Questions —Trespass—Placarding Hotel with Notice of Contagious Disease.

Application by plaintiff to compel defendant Anderson to answer certain questions which upon his examination for discovery he refused to answer.

M. E. O'Brien, for plaintiff.

George B. Henwood, for defendant Anderson.

SCOTT, J.:—Plaintiff in his statement of claim alleges that he is proprietor of a boarding-house in Wetaskiwin; that defendant Robertson, who is a physician at Wetaskiwin, and defendant Anderson, who is a constable there, broke and entered said boarding-house, and unlawfully placed a large placard bearing the word "Diphtheria" upon the door of one of the rooms thereof.

Defendant Anderson, by his statement of defence, admits the placing of such a placard upon the room in plain-

tiff's house, but alleges that he did so with plaintiff's consent, and in pursuance of an order given him by defendant Robertson, the then medical health officer of Wetaskiwin, and in the performance of his duties as such constable, under the provisions of the Public Health Ordinance and the by-laws of Wetaskiwin for the prevention of disease.

The questions which defendants Anderson refused to answer are as follows:—

1. Do you know whether or not she (one Edith Stromson) was quarantined at the Alberta hotel?

2. Did you place a diphtheria placard on any room in the Alberta?

3. Didn't you know that she was in the Alberta hotel sick for days before she went to the country?

4. Didn't you know that at the time she went to the country she was quarantined at the Alberta?

5. Did you have any conversation with him (one D. Auld) about the girl?

6. Had you any conversation with the girl when she was in the buggy, going to the country?

7. Did you tell her on Thursday in the Alberta hotel that you would get her a rig and drive her to a shack?

8. While she was in the Wetaskiwin house, were there any complaints about her food and the state of her room?

9. Did you have any conversation with Dr. Robertson in regard to her food?

10. Having admitted that he had a conversation with Dr. Dixon about the girl, after she was quarantined, upon being asked what the conversation was, he declined to answer.

No reason was given by either him or his counsel for his refusal to answer these questions, nor were any reasons stated on the hearing of the application.

I gather from the tenor of the questions asked, that the illness, or suspected illness, of the girl referred to in a number of them, was the cause of the placing of the placard. Surely any questions relating to his dealings with or conduct towards her are matters relative to the issues arising in the action upon which plaintiff should have the right to cross-examine. The same may be said with respect to conversations with his co-defendant.

As to conversations between him and others, not parties to the action, I doubt whether he should be asked as to statements made by such others during those conversations, but he should be compelled to testify as to the statements made by him during any such conversation.

If the defendant were held to be justified in refusing to answer the questions referred to, the right to cross-examine for discovery would be a barren one.

Order will go for the defendant Anderson to attend at his own expense before the clerk of the Court at Wetaskiwin, at such time and place as he shall appoint, and answer the questions referred to, except those relating to conversations between him and persons not parties to the action, but to answer such questions as may be put to him relating to statements made by him during any such conversation, and also to answer any such questions as may reasonably arise from his answers to any of the questions which he refused to answer.

Costs of the application to be costs in the cause to the plaintiff in any event.

ALBERTA.

SCOTT, J. NOVEMBER 15TH, 1907.

CHAMBERS.

MILLS v. MAGRATH.

Summary Judgment—Rule 103—Affidavit Verifying Cause of Action — Action on Foreign Judgment Recovered against Firm—Defence—Partnership—Members of Firm —Dissolution—Carrying on Business—Jurisdiction.

Summary application by the plaintiffs under Rule 103 for leave to enter judgment against the defendants for the amount of their claim and costs.

The action was brought by Mills and Sparrow against W. J. Magrath & Co.

By their statement of claim the plaintiffs claimed $8,345.09, being the amount of a certain judgment recov-

ered by them against the defendant in the High Court of Justice for Ontario, on 8th October, 1904, for debt, interest, and costs.

In support of the application there was filed the affidavit of Rowland Smith, the plaintiffs' manager, in which he stated that the defendant was justly and truly indebted to the plaintiffs in the sum of $8,345.09 upon a certain judgment recovered by the plaintiffs against the defendants in the High Court of Justice for Ontario on 8th October, 1904, no part of which judgment has been paid; that there was no defence to the action; and that, if any appearance was entered on behalf of the defendants, the same was entered for the purpose of delay.

An appearance was entered for the defendants, but, as it was afterwards shewn that the firm of solicitors who entered it had received instructions to enter it for W. J. Magrath alone, it was agreed between them and the plaintiffs' solicitors that the appearance should be treated as one entered by him alone.

O. M. Biggar, for plaintiffs.

C. C. McCaul, K.C., and H. H. Parlee, for defendants.

SCOTT, J.:—It was contended on behalf of the defendant Magrath that the affidavit referred does not sufficiently verify the cause of action, as it does not shew that the judgment therein referred to is the judgment sued upon, and therefore that it verifies merely a cause of action which may or may not be the cause of action sued upon. Murphy v. Nolan, 17 L. R. Ir. 468, was relied upon as supporting this contention, but, upon referring to it, I find that it supports the opposite view. In that case the writ was specially indorsed with a claim for a certain sum, being the balance due for goods sold and delivered between certain specified dates. The affidavit verifying the cause of action alleged that the defendant was indebted to the plaintiff in (the same sum) as per particulars indorsed upon the writ of summons. It was held by Lord Ashbourne, C., that the claim was sufficiently verified, but that the affidavit would not have been sufficient for that purpose if it had not referred to the particulars indorsed on the writ; but the other members of the Court in their judgments shew that, even if the affidavit had not referred to the particulars

indorsed on the writ, it would have been sufficient if it had alleged that the indebtedness was in respect of goods sold and delivered between certain dates, and it was found that those dates corresponded with those stated in the particulars. Here the judgment mentioned in the affidavit is for the same amount and of the same date as that referred to in the statement of claim.

I cannot find any authority for the contention that the affidavit must state that the cause of action referred to in it is the cause of action sued upon. The form of affidavit 23 A in part 2 of appendix B, which appears in vol. 2 of the editions of the Annual Practice for 1897 and 1898, does not appear to have been prescribed by the Rules of Court. It does not appear in the edition for 1903, and I cannot find any authority for its insertion in later editions. But, even if authorized, it appears to me to prescribe merely that the cause of action should be described with sufficient particularity to enable the Court to determine whether it was the cause of action sued upon.

I am, therefore, of opinion that the latter is sufficiently verified.

In his affidavit filed in answer to the application, defendant Magrath alleges that he is not now carrying on and never has carried on business in Alberta, neither alone or in partnership with any one else, as W. J. Magrath & Co., nor has he ever acted as manager nor been otherwise connected with any person, firm, or body corporate carrying on business in Alberta as "W. J. Magrath & Co.," that, to the best of his knowledge, information, and belief, the defendant firm are not now carrying on, nor did they ever carry on, business in Alberta; that the plaintiffs have never recovered any judgment against him in any court; that no such judgment as that mentioned in the statement of claim is on record against him; that he is not indebted to the plaintiffs in any sum whatever; that the defendant firm is not now carrying on business in Ontario; and that, to the best of his knowledge and belief, it was dissolved in or about the year 1904.

Defendant Magrath was cross-examined upon this affidavit, and in the course of his examination he stated that he carried on business in Belleville, Ontario, in partnership with one Davis under the name of W. J. Magrath & Co.

up to about the year 1901, at which time Davis retired from the business, and he (Magrath) continued to carry on the business alone under the same name up to the summer of the year 1904, and that thereafter it was carried on by his wife under the same name; that he thinks that the transaction with plaintiffs in respect of which their judgment (if any) was obtained took place after Davis went out of the business, and before his (Magrath's) wife took it over.

Upon being asked whether, assuming that there was a judgment, there was any reason why he should not pay it, he, upon the advice of his counsel, refused to answer, the ground stated for the refusal being that it involved a conclusion of law which the defendant was not competent to testify to. Other questions of similar import were put which he upon the same ground refused to answer.

Subsequent to his cross-examination upon his affidavit, defendant Magrath filed this statement of defence, in which, in addition to setting up the grounds of defence set out in his affidavit and denying the several allegations in the statement of claim, he sets up the further grounds that the plaintiffs never carried on business within the jurisdiction under the firm name of Mills & Sparrow; that said defendant is not indebted to the plaintiffs in any sum whatever; that, if any such judgment is on record in Ontario, the same is not valid and binding against him in Ontario, and is not such a judgment as can be sued upon in this Court against him; and that he never was subject to the jurisdiction of the High Court of Justice in Ontario or of any other Court therein, in the action in which said judgment (if any) was recovered. He also by his defence raises the following questions of law:—

1. That he cannot be sued in this action in the firm name of "W. J. Magrath & Co.," as it is not alleged that he is or ever has been carrying on business within the jurisdiction of this Court under such firm name, or that he is or ever was a member of or connected with any copartnership carrying on business under any such firm name within the jurisdiction.

2. That the statement of claim is defective in not shewing of what members the alleged firm of "W. J. Magrath & Co." consist or consisted, and in not shewing that the said firm has or has not been dissolved.

3. It is not alleged that he is or ever was a member of said firm or is or ever has been carrying on business as "W. J. Magrath & Co.," either in Ontario or elsewhere.

Upon the hearing of this application, defendant's counsel read the further affidavit of the defendant in which he alleges that he is advised by his solicitor and believes that he has a good defence on the merits to the action, for the reasons or some of the reasons disclosed in his statement of defence.

Counsel for the plaintiff objected to this affidavit being read, on the grounds that it was filed subsequent to his cross-examination on his first affidavit, and that upon such cross-examination he had refused to answer certain questions respecting matters referred to in such further affidavit. I directed that it be read subject to the objection.

Under Rule 103, the defendant Magrath or defendant firm, as the case may be, must satisfy me that he or it has a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him or it to defend, that is, it must be shewn that there is a fairly triable issue. An affidavit that a defendant has a good defence on the merits under one or more of several defences pleaded by him is not, in my opinion, sufficient.

If the defences relied upon are founded upon questions of fact, those matters of fact should be disclosed and deposed to, and if founded upon questions of law, the points of law upon which he relies should be raised by him upon the application for judgment, in order that, in each case, the Judge to whom the application is made may be in a position to determine whether a fairly triable issue is disclosed.

The cross-examination of the defendant satisfies me that W. J. Magrath has no reasonable ground for contesting the fact that plaintiffs recovered judgment against "W. J. Magrath & Co.," or that, at the time the debt in respect of which that judgment was obtained, was contracted, he was carrying on business alone under that name within the jurisdiction of the Court in which the judgment was obtained. In fact the sole ground of defence relied upon by his counsel at the hearing of the application was that plaintiffs could not in this province sue either him or the firm of "W. J. Magrath & Co." by that name, owing to the fact

that neither he nor any firm ever carried on business here under that name.

As the right to sue in the firm name either a partnership or an individual carrying on business in the firm name is dependent upon legislative authority, it is pertinent to refer to the history of that authority.

Rules 14 and 15 of Order XVI. of the English Rules of 1883 provided that any two or more persons liable as partners, or any person carrying on business in the name of a firm apparently consisting of more than one person, might be sued in the firm name, and these Rules were incorporated without changes in the Judicature Ordinance of 1888. (See R. O. 1888 ch. 58, secs. 43, 44).

They were not in express terms restricted to cases where the firm or individual was carrying on business within the jurisdiction of the Court. The English Rules were, however, amended by the Rules of 1891 (see Order XLVIII. (a), Rules 1-11), and by that amendment the right to sue in the firm name partners (Rule 1), and an individual (Rule 11) was so expressly restricted. Section 43 of ch. 58, relating to suits against partners in the firm name, was amended in 1893 so as to correspond with Order XLVIII. (a), Rule 1, but sec. 43 has not been amended, and now appears as sub-sec. 2 of Rule 38 of the present Rules. It is as follows: "2. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm."

I think it is apparent that the Territorial legislature having expressly provided by the latter amendment that the right to sue partners in the firm name should be restricted to cases where they are carrying on business within the jurisdiction, and having omitted to make a similar provision with respect to actions against individuals carrying on business in a firm name, must have intended that the latter right should not be so restricted.

It is, however, contended that, notwithstanding the fact that no such express restriction is contained in sub-sec. 2, it must be read and construed as if its effect was so restricted, as any other construction would result in its constituting an infringement of the rules of International law.

In my view, this contention cannot be upheld.. The cases cited in support of it, Western National Bank v. Rerez, [1891] 1 Q. B. 304, and Russel v. Camhenport, 23 Q. B. D.

526, appear to go the length of holding that Order IX, Rule 6, relating to service upon partnerships, and (presumably) the repealed Order XVI., Rule 14, relating to suits against partnerships in the firm name, are not applicable to foreign partnerships, on the ground that the opposite construction would constitute it a contravention of these Rules; but, in my view, no such question can arise where the individual sued in a firm name is, as in this case, within the territorial jurisdiction of the Court. I see no reason why the legislature could not in such case, without infringing these Rules, provide that he might be sued in any name other than his own.

I have shewn that defendant Magrath has disclosed no reasonable ground for contending that plaintiffs did not recover the judgment sued upon against him under the name of W. J. Magrath & Co., or that the debt in respect of which that judgment was obtained was not incurred by him while carrying on business alone under that name; and, as the ground of defence relied upon by him cannot, in my view, be supported, the plaintiffs are entitled to the order applied for with costs.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 7TH, 1907.

TRIAL.

FULLER v. HUNKER MERCANTILE CO.

Sale of Goods — Title — Chattel Mortgage—Bill of Sale—Description—Evidence—Trover.

Action for the recovery of a waggon, or the value of it, taken by the defendant company, which waggon the plaintiff claimed as his property.

C. W. C. Tabor, for plaintiff.

F. J. McDougal, for defendants.

CRAIG, J.:—The first transaction in connection with the waggon was a chattel mortgage made between William

O. Robertson and the plaintiff on 31st July, 1905. The description in the mortgage is, "two waggons with freight boxes," and there is in the mortgage a general clause covering all the goods of the mortgagor of every nature and kind. The mortgage seems to be regular, and in conformity with the Act, and filed properly. Next, there is a bill of sale between Robertson and Fuller of 5th July, 1906, covering the same waggon, as appears from the evidence, and in that bill of sale the waggon is more particularly described as a "waggon, 3½ gear, box painted yellow," etc., being a correct description of the waggon in question.

On 26th May, 1906, Robertson gave to Fuller, the plaintiff, a power of attorney to deal with all his chattels covered by the chattel mortgage and bill of sale, and other chattels, and to pay himself the amount coming to him and the balance to Robertson. A power of attorney was given on 26th February of the same year to Dan L. Harley, being a general power of attorney. Fuller, the plaintiff, on 5th July, 1906, discharged the chattel mortgage in question. The defendants took away the waggon some time in April, 1906, and between the 18th and 25th April. The defendants claim title to the waggon under a purchase made by Macrae, one of the defendant company, from Robertson, the then owner. Macrae's story is that Robertson was in debt to him prior to 1st July, 1905, and that to pay that debt he took over the waggon. Robertson denies this absolutely. Robertson says that he owed Macrae, and that in his books, by agreement with Macrae, the amount of the debt was debited to Macrae, and credited to the Hunker Mercantile Company. All the evidence goes to confirm the story of Robertson.

The Hunker Mercantile Company was formed upon 1st July, 1905, and consists of D. A. Macrae and William Moore. Upon that day the books of Robertson shew exactly what he says took place, that is, that he was indebted to Macrae in the sum of $173 or $176—the amount is immaterial, because both parties admit the identity of the account; that upon that day he debited Macrae with the amount, and credited the Hunker Mercantile Company. There is no entry in the books either of Macrae or of Robertson of a sale of a waggon. There is no entry in the Hunker Mercantile books of a waggon coming into stock, at least not shewn by Macrae, and being in the stock account and cred-

ited to Macrae as part of his capital investment. On the contrary, the books of the Hunker Mercantile Company shew on that very day that the same amount was carried forward into their books as a debit account against Robertson, and so continued as a debit, and was carried on in that way in the books and rendered in the account against Robertson on 17th January, 1906, when an account was rendered against him of $308.13. I have carefully examined the books, both after and during the trial, and this amount involves the amount formerly carried into the account of $176. So that there could have been no credit of a waggon by sale to Macrae, or this account would not or should not have been carried into the books of the Hunker Mercantile Company in the form in which it was, and certainly if Robertson had paid his debt to Macrae, and thereby paid it to the Hunker Mercantile Company by a transfer of a waggon, the account should not have been carried on against him and rendered against him as late as January, 1906. In further confirmation of Robertson's statement, there is no credit given to Robertson for the waggon in the books of the Hunker Mercantile Company until 18th April, the day when they say they took the waggon away. Macrae tries to explain this by saying the sale was a sort of mortgage sale, with the right of redemption, and that he did not credit the amount until they had sold the waggon. That the waggon was not transferred is also evidenced by the fact that Robertson retained possession of it. Concurrent with the transfer of the account he entered into a contract with the defendant company to do their freighting, and used this waggon and other waggons, retaining possession of both waggons until this one was taken away by the defendants in April, 1906. Something is attempted to be made of the fact that upon the waggon was painted the name of the Hunker Mercantile Company, but it is in evidence that the other waggon, about which there is no dispute, and in which Robertson's and Fuller's title is admitted, had also a similar sign upon it, and Moore, one of the defendant company, says the sign was put on, he presumes, for advertising purposes. This is also sworn to by Robertson and by Scougale, a man in charge of the waggon for Robertson, and not denied. There was no memorandum of sale passed between Robertson and Macrae. The waggon in question was used by Robertson right up to the time he left, in February,

1906, for Fairbanks, and was used in hauling other goods than the goods of the defendant company, with whom it appears he had an exclusive contract of hauling. It is in evidence that Moore asked for a bill of sale of the waggon in the spring of 1906, and Robertson refused to give it. There is also evidence that in the spring of 1906 one McDonald, who afterwards bought the waggon from the Hunker Mercantile Company, and who was a teamster for them, at the instigation of Moore, wired to Robertson asking if he would sell the waggon and the price, and that Robertson wired back what he wanted for the waggon. Here is conclusive evidence, to my mind, that up to that date Moore, at least, had no knowledge whatever that the waggon was the property of the Hunker Mercantile Company. This telegram was dated in April, 1906. Moore now endeavours to say that the telegram was only sent to establish the value of the waggon. That seems to me to be a rather strange statement, in view of the fact that they had already sworn that they bought the waggon at the price of $176. Dan Harley also swears that McDonald came to him in the spring of 1906 to buy this very waggon, and Moore practically admits authorizing McDonald to make the advances.

The onus is upon the defendants to prove their title. They took the waggon out of the possession of Robertson, who had mortgaged to Fuller. The mortgage was in full force and virtue at the time they took the waggon away. They only obtained any possession of it by trespass in April, and upon the whole case, I am of opinion that I must believe Robertson's account of the transaction, confirmed as it is by all the surrounding facts and circumstances. I do not believe that any purchase was made, but think that the waggon was taken possession of just as one of the witnesses says it was, that is, Fuller, who says Macrae told him that Robertson owed him and he would keep the waggon. That, I think, is the true account of the whole matter. I have already detailed the evidence which leads me to this conclusion, and I think it is one which is entirely borne out by the evidence.

The only question of law raised upon the argument was the insufficiency of the description contained in the chattel mortgage, under sec. 12 of our Bills of Sale and Chattel Mortgage Ordinance. Whether or not the description con-

tained in the chattel mortgage would be sufficient as against subsequent bona fide purchasers, I need not consider, because I have held that the Hunker Mercantile Company have not met the onus which rests upon them of shewing that they ever acquired the title to this waggon at all. So far as the title of Fuller is concerned, it is admitted by Robertson, who was the owner at the time of the making of the chattel mortgage, and from whom both parties claim title. The description in the chattel mortgage is sufficient as between Fuller and Robertson at all events, and, as against a person that I have held has not established any title at all, must prevail. Fuller is entitled, not only under the chattel mortgage, but under a power of attorney giving him possession and power to sell, and also under a bill of sale, which very clearly and specifically describes the article in question. But this whole discussion as to the sufficiency of the mortgage is not called for under my ruling that the Hunker Mercantile Company have not established Macrae's title nor their own.

On the question of damages, I think the weight of testimony is in favour of allowing $250 as the value of the waggon, and there will be judgment for that amount with costs.

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MANITOBA.

RYAN, Co. C.J. AUGUST 20TH, 1907.

COUNTY COURT OF GLADSTONE.

DAVIS v. BUTLER.

Promissory Note—Instrument in Form of Note with Additional Provisions — Interest — Accelerating Clause—Waiver of Presentment, etc.—Holder in Due Course.

Action to recover $200 upon the instrument set out below.

W. J. Wright, Winnipeg, for plaintiff.

A. Meighen, Portage La Prairie, for defendant.

RYAN, Co. C.J.:—The principal questions for decision are: first, is the instrument sued on a promissory note? and next, is the plaintiff a holder in due course?

The instrument is as follows:—

"$200. Oakland, Iowa, October 7, 1905.

"March 1st, 1906, after date, we or either of us promise to pay to the order of J. K. Hall, two hundred and no/00 dollars, with interest at 6 per cent. per annum from maturity. Interest payable annually, and defaulting interest and principal to draw 8 per cent. interest until paid. And a failure to pay any of said interest within 30 days after due shall cause the whole note to become due and collectable at once. The makers, indorsers, and guarantors of

this note agree to pay a reasonable attorney's fee if suit is brought thereon, and consent that any justice of the peace may have jurisdiction to the amount of $300, and hereby severally waive presentment for payment, notice of non-payment, protest, and notice of protest, and diligence in bringing suit, against any party hereto, and sureties consent that time of payment may be extended without notice thereof. Payable at Gladstone, Man.

"Address.....Part consideration of McCrae land contract.

"No. .....

"Virgil W. Butler."

This instrument was before maturity (in November, 1905), sold and indorsed by the payee, J. K. Hall, to the plaintiff, who bought in good faith, and gave Hall $125 in cash and $75 by allowing Hall that amount on a debt due by Hall to plaintiff, for the instrument. Hall was the real estate agent who sold the property for the vendor, McCrae, to the defendant, and the $200 for which the instrument sued on was given, represented a part of the first payment on the land, and probably was intended to pay the commission to which Hall was entitled from McCrae for making the sale. By the terms of the agreement of sale between McCrae and the defendant, McCrae was to leave 100 acres of the land fall-ploughed, which he failed to do, and Butler refused to make the first payment of $1,100 and to pay the instrument sued on, both of which were due on 1st March, 1906, in consequence of which the sale went off. When the plaintiff bought the instrument in question, he was aware that it represented a portion of the first payment to be made by the defendant on the land, and he was aware that by the terms of the agreement of sale, McCrae was to leave 100 acres of the sold land ploughed, but he was not aware that the 100 acres had not been ploughed.

The accelerating clause making the whole note due upon failure to pay interest has no application, as the whole amount, both principal and interest, became due at the same time; but, even if it were applicable, it would not, under the authorities, vitiate the note, or render it not a note.

The agreement to pay attorney's fee, consent to jurisdiction up to $300 in justices of the peace, waiver of presentment for payment, protest, notice of protest, and of the

effect of extending the time for payment, although extremely unusual in Canada, and in part apparently ineffectual, do not, I think, render the promise to pay conditional, or deprive the instrument of the character of a note, or of its negotiability: see Falconbridge on Banking and Bills of Exchange, p. 631; Kirkwood v. Carroll, [1903] 1 K. B. 531; Yates v. Evans, 61 L. J. Q. B. 446. See also Chesney v. St. John, in which a note given under circumstances similar to these existing in the present case, was held negotiable.

I am of the opinion that the instrument in question is a promissory note, and that the plaintiff is a holder in due course.

There will be judgment for the plaintiff.

MANITOBA.

MACDONALD, J. NOVEMBER 18TH, 1907.

TRIAL.

WILLOUGHBY v. CONOVER.

Promissory Note — Purchase Price of Horse—Warranty—False Statement—Repudiation of Sale—Negotiation of Note—Knowledge by Indorsee of Facts—Holders in Due Course—Onus—Fraud.

This action was originally brought in the name of William Willoughby as sole plaintiff, but being on two promissory notes which were specially indorsed to the Union Bank of Canada, the plaintiff was allowed to amend by adding (with their consent) the bank as co-plaintiffs.

The notes in question were given as the purchase price of a horse sold to the defendants by one D. McGibbon. The horse, it was said by McGibbon, was purchased by him from the plaintiff Willoughby, for the sum of $800, the plaintiff Willoughby having purchased it a few months previously for $250. McGibbon shortly after the purchase took the horse from Neepawa to Miniota, where the sale was made to the defendants.

M. B. Jackson, for plaintiff.

A. B. Hudson, for defendants.

MACDONALD, J.:—I find as a fact that the horse was warranted a registered pedigreed horse, and I also find that McGibbon knew that he was not a registered pedigreed horse, and he so warranted him and produced a paper card (exhibit 6) which he represented as a pedigree for the purpose of deceiving the defendants and inducing them to purchase, and on the strength of which they did purchase. Willoughby knew the horse was not a pedigreed horse; if he were, he says he would be worth more money. McGibbon says: "If I had a registered certificate, would ask $2,500 for the horse; consider him worth $1,000 more with certificate." There is no doubt in my mind, therefore, that McGibbon knew that the horse had not a pedigree, and that he warranted him to the defendants well knowing that his statement was false.

Prior to the closing of the sale with the defendants, McGibbon disposed of an interest in the horse (one share) to one Whitney, whereas at the time of closing with the defendants he expressly denied that any one else had any interest. Shortly afterwards Whitney advised the defendants of his interest in the horse, and then their suspicions were aroused, and they discovered that the ticket or card (exhibit 6) was not a certificate of pedigree, nor had they any evidence that the horse was one with a pedigree. They then immediately consulted counsel and failing in their efforts to get evidence of the horse having a registered pedigree, proceedings were taken having for their purpose the repudiation of the sale.

On 25th April defendants' solicitor had a conversation with the plaintiff Willoughby, when the trouble over the horse was discussed. On that occasion Willoughby stated that he had not the notes and did not know anything about them, and promised to send him copies of them if he could. On 28th April Bennest wrote Willoughby reminding him of his promise, to which he received reply (exhibit 10) referring him to McGibbon, who could give him all information about the notes. I think I am justified in finding that the notes had not up to that time come into the possession of the plaintiff Willoughby, and that he subsequently came into possession of them with knowledge of the facts connected with the sale of the horse for which the notes had been given, and that he was not a holder in due course, and

the same defence that is open to the defendants if McGibbon were the plaintiff, is open to them as against Willoughby.

The Union Bank are in no better position. Newcombe, the accountant, says that the plaintiff Willoughby is the present holder of the notes, and that before action he became the holder, although the bank were interested, having the notes with many others as collateral; having, however, given up the notes to Willoughby, their rights now are no better than his.

The defendants strongly contend that they did not make the notes sued on; they say there were three notes originally signed, two by some of them and one by them all; the two signed by some were given up and destroyed, and the remaining one, which they allege was given for $1,500, was the only other note signed by them, and it was, they say, signed by D. McGibbon as a joint maker, and that it was payable to the plaintiff Willoughby. They say that Willoughby, who is a horse dealer, was represented to them by McGibbon as the owner of the horse, and I am inclined to the belief that he did so, and that they were impressed with the fact that they were giving their note to Willoughby. I am satisfied, however, that they did not give a note of $1,500 in favour of Willoughby, and that the notes sued on are the notes they signed. There is no room for doubt about the notes being signed by them, but I am equally convinced that the notes were tampered with after coming into the hands of McGibbon. The defendants swear, and McGibbon does not deny, that he purchased a two-shares interest in the horse, and they further swear that McGibbon, at their solicitation, joined with them as a maker of the notes. I believe he did, and that his name was erased; the notes shew distinct marks of erasure, and it is evident that the erasion is of ink, and is of such a character, in view of the evidence of the defendants, that it demands the clearest evidence explaining it; that evidence not being given, I must find against the validity of the notes.

Fraud being proved, the onus is upon the indorsees to shew that they are holders in due course, which they have not done: Tatam v. Hasler, 23 Q. B. D. 345. As soon as the fraud was discovered by the defendants, they took steps to rescind, and the leaving of the horse at a livery and

notification to the plaintiff Willoughby and to McGibbon was a sufficient repudiation and rescission of the contract.

I dismiss the action with costs.

MANITOBA.

MACDONALD, J. NOVEMBER 19TH, 1907.

CHAMBERS.

COTTER v. OSBORNE.

Contempt of Court—Committal of Defendant for Non-production of Book—Application for Discharge—Destruction of Book — Apology — Purging Contempt—Payment of Costs.

After the appeal to the Court of Appeal, 6 W. L. R. 690, had been dismissed, the defendant Litster was arrested and committed to gaol under the writ of commitment for contempt of Court in not producing the book in question.

Subsequently an application was made for his release. An affidavit was filed by Litster's mother in which she stated that she had burnt a minute book, her son having told her there was trouble over it, and she, thinking that if the cause of the trouble were removed the trouble itself would cease, destroyed the book, but she never informed her son of what she had done. There was no positive evidence that, although the mother burnt a minute book of the Union—of which she was confident, as she examined the contents before she burnt it—that the book burnt was the one which Litster was required to produce. Litster filed an affidavit on the application tendering an apology to the Court, and he stated that his mother never informed him that she had destroyed the book.

H. W. H. Knott, for the prisoner, cited Monkman v. Sinnott, 3 Man. L. R. 170; Felkin v. Herbert, 12 W. R. 332; and Oswald on Contempt, p. 114.

J. E. O'Connor and H. P. Blackwood, for the plaintiffs, cited Price v. Hutchison, L. R. 9 Eq. 534; Harris v. Myers, 1 Ch. Ch. 229; and In re M., 46 L. J. Ch. 24.

MACDONALD, J.:—Evidence has been given that the mother destroyed the minute book, but how she got possession of it is a mystery.

The prisoner had it in his possession at the time and for some time after he had been served with a notice to produce it, and he says he left it at the Trades Hall, and that was the last he saw of it.

I am not at all satisfied that the mother burnt the book in question; I believe the book has been put out of the way by the members of the executive of the Union, or through their connivance.

It is urged on behalf of the prisoner that he should be discharged without any condition as to the payment of costs incurred in connection with the missing book, and the case of Monkman v. Sinnott, 3 Man. L. R. 170, is cited in support of the application, but in that case Mr. Justice Taylor found that the defendant had been sufficiently punished.

I am satisfied that the prisoner cannot purge his contempt; the book is put beyond his reach, but it must be remembered that he is himself the author of his trouble: he should have held control of the book, particularly as he had had notice to produce it, and it is very evident that he left it at the Trades Hall in the expectation that it would have gone beyond his control.

He has put the plaintiffs to a large amount of unnecessary expense, and they should not be made to suffer through his misconduct.

Under the English authorities prior to the Debtors Act, 1869, a party could be held in prison even for non-payment of costs, and if the order for his release was conditional upon payment he could be held for their non-payment, but since that Act, if he has cleared his contempt, he cannot be held for non-payment of costs: Jackson v. Mawby, 1 Ch. D. 86.

Since that case, however, in In re M., 46 L. J. Ch. 24, where a person was committed to prison for contempt of Court in disobeying an order not to communicate with a ward of Court, an order was made that on payment of certain costs the prisoner should be released. He failed to pay the costs, and it was held that, inasmuch as he had not purged his contempt, he was not under the Debtors Act in prison for debt, or entitled to be released, and this was affirmed on appeal.

Here the prisoner is in prison for his contempt, and not for non-payment of debt, and he has not purged his contempt.

Upon evidence being forthcoming of the payment of all the costs that have been incurred by reason of his misconduct in connection with the lost minute book, I will consider an application for his release, or I will consider such application if such costs cannot be paid by reason of poverty. Meantime I refuse the application.

[The costs were subsequently paid, and defendant released.]

MANITOBA.

PERDUE, J.A. NOVEMBER 21ST, 1907.

TRIAL.

REX v. SMITH.

Criminal Law—Manslaughter—Peace Officer Shooting Man whom he was Endeavouring to Arrest without a Warrant —Reasonable and Probable Cause—Question for Jury—Directions to Jury—Intention to Wound in Order to Prevent Escape—Accidental Killing.

The accused was indicted for manslaughter. He was tried before PERDUE, J.A., with a jury.

It appeared that the accused, being a peace officer, was endeavouring to arrest without a warrant one Gans, a man whom he, on reasonable and probable grounds, believed to have been guilty of the theft of valuable furs from the shop of one McNeil, merchant tailor in the city of Winnipeg. The deceased on 14th October, 1907, offered the furs for sale, at a price greatly under their value, to McFarlane, another merchant tailor, who, suspecting that they were stolen, arranged with the deceased to come to the shop the next morning to get his money, and then informed the police. The accused, who was a police detective, had been informed of the theft of the furs and of the circumstances

in which they had been stolen. He went to McFarlane's shop, and, from what he heard there, believed the deceased was the thief who had taken McNeil's furs.

The next morning the accused went to McFarlane's shop and waited there, expecting that the deceased would come for his money. On the arrival of the deceased at McFarlane's shop on the morning of 15th October, he caught sight of the accused and immediately bolted out of the door and ran away. The accused followed him in an endeavour to effect his arrest, and fired several shots from his revolver with the view of intimidating him and inducing him to surrender. The deceased still continued his flight, and the accused, after pursuing him for some 350 yards was becoming exhausted, and believing, as he alleged, that deceased was about to escape, he fired at deceased, who was then about 25 yards ahead of him, intending to wound him in the leg. The revolver was unintentionally pointed too high and the bullet struck the deceased in the head, killing him instantly.

N. F. Hagel, K.C., G. Patterson, and W. H. Hastings, for the Crown, contended that, following the rule in cases of malicious prosecution, the Judge at the trial should decide the question of reasonable and probable cause, under sec. 30 of the Criminal Code.

R. A. Bonnar, G. A. Potts, and E. L. Howell, for the accused.

PERDUE, J.A., held that the accused, who had elected to be tried by a jury, was entitled to have every question of fact determined by the jury; that it was not feasible in a criminal case to leave questions of fact to be answered by the jury, and then upon these answers to have it pronounced by the Judge whether there were reasonable and probable grounds for arresting without a warrant. He therefore left the question of fact arising under this section to the jury, directing them to apply the law as stated by him.

In charging the jury upon the evidence the Judge left two questions to them for their guidance. The first question was, whether the accused under sec. 30 of the Criminal Code, on reasonable and probable grounds, believed that an offence for which the offender might be arrested without a warrant had been committed, and whether the

accused, on reasonable and probable grounds, believed that the fugitive had committed that offence. In discussing this point the jury were told that if a person who has formed the intention of stealing something in a shop or store opens a door leading into that shop or store by lifting the latch or turning a knob and then enters the store, although during business hours, for the purpose of carrying out his intention, and then does actually steal and carry away goods from the shop or store, he may be convicted of shop-breaking: secs. 460 and 335 (c) of the Criminal Code.

If, therefore, the accused believed, on reasonable and probable grounds, that the deceased had opened the door and entered the shop from which the furs had been stolen with the intention and for the purpose of committing a theft, and had then committed the theft of the furs, he would be justified in believing that the deceased had committed the offence of shop-breaking and theft, an offence for which he might have been arrested without a warrant. If, upon the other hand, the shop was open and the deceased walked in during business hours and took the furs and departed, it would be a case of simple theft for which he could not be arrested without a warrant, unless the officer actually saw him committing the offence.

The Judge also charged the jury that if they found that the accused, on reasonable and probable grounds, believed that an offence for which the deceased might have been arrested without warrant had been committed, and on reasonable and probable grounds believed that the deceased had committed that offence, they would further have to consider the second question, which arose under sec. 41 of the Criminal Code, whether the force used by the accused to prevent the escape of the fugitive by such flight was necessary for that purpose, and whether such escape could have been prevented by reasonable means in a less violent manner, or, in other words, whether the accused did the shooting of necessity or not, and whether he exceeded the powers conferred on him by law in firing the revolver at the fugitive. Upon these points the Judge proceeded as follows:—

"If you have answered the first question in the affirmative and find that Smith had a right to arrest Gans without a warrant, then Gans was fleeing to evade a lawful ar-

rest, and Smith was justified in using reasonable force in order to apprehend him and prevent his escape. The grave question here is, what is the degree of force which Smith should have used, and the first thing for you to consider is, could Smith have apprehended the man by any other means, except by shooting him? If you find he could have apprehended him by any other means, then Smith was not justified in shooting him. Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person who is attempting to escape by flight.

"A man who is fleeing from lawful arrest may be tripped up, thrown down, struck with a cudgel and knocked over, if it is necessary to do so to prevent his escape, and if he strikes his head on a stone and is killed, the police officer is absolved, because the man was fleeing to escape lawful arrest, and the means taken to stop him were not dangerous and not likely in themselves to cause his death. But firing at a man with a revolver may result in the death of the man, as it did in this case, although the intention was only to wound and to prevent the escape."

The Judge then reviewed the evidence of the chase, and proceeded: "It is the duty of every citizen to assist in the pursuit and capture of a criminal who is fleeing from arrest, when such citizen is called upon to do so by a peace officer."

He described what was meant by a hue and cry, which the Crown counsel said should have been raised. Passing on he said:—

"You will have to consider whether Smith, if he had not had that revolver or had kept it in his pocket, might not have called to his assistance persons in the street, who would have joined him in the pursuit and have prevented Gans's escape. You will consider whether firing with the revolver did or did not deter them from rendering assistance. You will also have to consider whether Smith should have abandoned the pursuit of Gans at that time. He says his breath failed, his wind was gone, but should he have called upon some of the other persons who were running behind him, and have asked them to follow Gans and keep

him in sight until another policeman came up? You will have to consider if the escape of Gans could have been prevented by such means."

The Judge further said they would have to consider whether the men who said they went round to Frances street to head off the pursuit, and arrived there only to see the man lying on the ground dead, could not have overtaken him if called upon to do so. These were questions strictly for the jury. They would also bear in mind that the accused heard the clatter of a horse and buggy following him, and also that there were several other persons running behind, including Wootton and the young man Ludwig.

The questions were left to the jury for their own guidance as to the manner in which they were to proceed in arriving at a conclusion. The answers which they gave to them were not to be reported to the Court. Their verdict was to be simply "guilty," or "not guilty." The questions were written out and handed to the jury with directions as above.

The Judge further charged that it was admitted by the accused that the bullet which caused Gans's death was fired by the accused with the intention of wounding Gans in the leg, but that it unfortunately struck him in the head and caused death.

Concluding, he said: "Unless Smith was justified at law in the manner I have pointed out, he would be guilty of manslaughter. If a man fires at another only intending to wound but actually causes death, he is guilty of manslaughter."

At the request of counsel for the defence, the Judge further explained to the jury that the escape referred to in the Code meant escape from the flight then going on, and that the possibility of the fugitive being found and apprehended subsequently need not be considered.

The jury brought in a verdict of not guilty.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

GROBB v. DARLING.

Contribution—Co-sureties—Makers of Promissory Note for Accommodation of Third Person — Question of Fact—Finding of Trial Judge—Defendant Guarantor for Plaintiff, and Note Paid by Plaintiff—Right to Contribution from Defendant.

County Court appeal.

In May, 1903, the plaintiff and defendant made a promissory note for $208 as co-sureties for Eli Grobb. The plaintiff paid the note, and brought this action to recover $138.60 as the contribution due by defendant.

MYERS, Co. C.J., who tried the action, nonsuited the plaintiff, who appealed.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. E. Cohen, for plaintiff.

M. G. Macneil, for defendant.

HOWELL, C.J.A.:—The defendant and Eli Grobb were the makers of a promissory note held by one MacLennan. The defendant had become such maker for the accommodation of Eli Grobb, who received the consideration for the note from MacLennan. The note became due, and MacLennan asked for payment. The plaintiff and Eli Grobb promised the defendant that they would try to get MacLennan to accept a note made by them, in lieu of the former note to which the defendant was party. The plaintiff and Eli Grobb signed another note as makers and took it to MacLennan, but MacLennan, though he apparently knew of the promise by the plaintiff and Eli Grobb to the defendant, was not satisfied with having only Eli Grobb and plaintiff as makers, but took the note to the defendant and re-

quired him also to sign as a maker. The defendant did so. When the note became due, the plaintiff paid it. He then brought this action, claiming contribution from the defendant. The defendant alleged that he was not a co-surety with the plaintiff in the note, but was rather a surety to MacLennan that the plaintiff or Eli Grobb would pay the note. As the plaintiff did pay it, the defendant contends that for the above reason the plaintiff has no right of contribution. The learned trial Judge took that view of it, and nonsuited the plaintiff.

With every respect to the view taken by the trial Judge, I am unable to concur in it. The defendant was a party to the former note and liable on it. The promise of the plaintiff and of Eli Grobb to the defendant was merely that they would endeavour to get MacLennan to release him. This promise was made without any consideration, so far as the plaintiff was concerned, and, apparently, the plaintiff carried it out as far as he could by asking MacLennan to release the defendant. There was no agreement whatever between the plaintiff and defendant as to what should be the position between them if the defendant should become a party to the last note. That was apparently not contemplated by them when the plaintiff promised to try to get MacLennan to release the defendant. There was, as I see it, no obligation whatever on the part of the plaintiff, under any circumstances, to indemnify or hold harmless the defendant. His sole promise, as stated above, seems to me to have been to try to get MacLennan to release him. If in substitution for the former note MacLennan had accepted the new note, with only the names of the plaintiff and Eli Grobb on it, the release would have been thereby accomplished, but it would have been accomplished by the act of MacLennan and not of the plaintiff. As matters stood, however, the defendant, being liable on the former note, could have been sued by MacLennan, and would have been so sued, it is to be presumed, if he had not complied with MacLennan's request and signed the second note. It appears to be the fact that the plaintiff did not know that the defendant was going to sign the second note, but that does not seem to me to make any difference as to the position of the defendant and the plaintiff, as between themselves.

The case of Ianson v. Paxton, 22 C. P. 505, is, I think, in point. In that case two parties indorsed a note for the accommodation of the maker of it. When the first indorser put his name on, he did not know that the second indorser was to become a party to it. He had no reason to suppose that any one other than himself was to be a party to the note in the position of a surety for the maker. The note, when due, was paid by the first indorser, and he was held to have a right to claim contribution from the second indorser.

With much deference to the views of the trial Judge, I think the appeal should be allowed and judgment entered for the plaintiff for the amount sued for.

I would allow the appeal with costs.

PERDUE, J.A.:—A promissory note for $280.23 had been made in favour of J. K. MacLennan by Eli Grobb, Sylvester Grobb, and J. J. Darling. The note was paid by Sylvester Grobb, the present plaintiff. He asserts that he and Darling went on the note as co-sureties for Eli Grobb, and he brings this suit against Darling for contribution as a co-surety. A nonsuit was entered in the County Court, and from this finding the present appeal is brought.

It appeared from the evidence that a previous note had been made in favour of MacLennan by Eli Grobb and Darling, the latter going on the note merely as a surety. Sylvester Grobb was not a party to that note. The present note was given to take up the first one, and bears this entry on the face of it, "to renew E. Grobb note."

Darling states that after the first note came due he had a conversation with the two Grobbs, and it was agreed that Sylvester Grobb should go upon the new note in place of Darling, and that the latter should be released. The County Court Judge found as a fact that the Grobbs did so agree with Darling that they would assume the debt, and that they gave the present note in pursuance of that agreement.

The evidence shews that MacLennan refused to take a note with only the names of the two Grobbs upon it, and to release Darling. He insisted upon Darling's name being also upon the renewal note, and the latter then signed it. This made him a surety for Eli Grobb's debt to MacLennan. Sylvester Grobb was also a surety on the same

note for the same debt. The fact that Darling signed the note some time after the others had signed it, does not make him any the less a surety on the note along with Sylvester Grobb. If he is a surety for the same debt along with Sylvester Grobb, in whatever way he became such surety, if the other surety is called upon to pay, he must contribute: Whiting v. Burke, L. R. 6 Ch. 345.

It appears to me that the true position was this. Darling was liable on an overdue note as surety for Eli Grobb. He wished to get rid of his liability, and asked Eli Grobb to get Sylvester Grobb to go on a new note to take the place of the one upon which he, Darling, was liable. They were willing to do this, but MacLennan would not consent. Then Darling also signed the new note. The transaction that had been proposed for the purpose of releasing Darling was not carried out, and Darling had to go upon the note as surety for Eli Grobb, Sylvester Grobb remaining on the note also as a surety for Eli Grobb.

The trial Judge found that MacLennan and the Grobbs persuaded Darling to sign the note as surety that it would be paid by one or other of the Grobbs; that the defendant was not a co-surety with the plaintiff, and, therefore, not liable to reimburse the plaintiff. I do not think that there is evidence to support this finding. According to the evidence of Darling himself, there does not appear to have been any further interview between him and the Grobbs between the time Sylvester Grobb agreed to go upon the note and the time that Darling signed the note at the instance of MacLennan. There is no evidence that there was any agreement that the defendant should sign the note as a surety for the other two makers.

The appeal should be allowed with costs and judgment should be entered in the County Court for $138.60 with costs including the ordinary counsel fee.

RICHARDS, J.A., concurred.

PHIPPEN, J.A. (dissenting):—This case resolves itself into one simple question of fact. Did the defendant Darling, in signing the note, do so as joint guarantor with the plaintiff of Eli Grobb (in which case the plaintiff must succeed), or as guarantor of Eli Grobb and the plaintiff (in which case the plaintiff fails).

The County Court Judge has found that "Eli Grobb and Sylvester Grobb agreed with the defendant to assume the debt or note due by Eli Grobb to MacLennan, and gave the note, exhibit No. 1, in pursuance thereof, but this was not satisfactory to MacLennan, and he and the Grobbs persuaded the defendant to sign the note as surety that it would be paid by one or other of the Grobbs. The defendant was not a co-surety with the plaintiff, and therefore not liable to re-imburse the plaintiff in any amount."

In other words, he has found, as a fact, that the defendant signed as sole guarantor of the two Grobbs, and not as joint guarantor with the plaintiff. Is there evidence to suport this finding?

It is admitted that the defendant signed the note which was given to retire a former note, as guarantor for Eli Grobb. When the original note matured, MacLennan, the holder, pressed for payment or security. The defendant tells this story of what then took place.

Q. Now will you look at exhibit 1. Will you tell the Court whether at the time of exhibit 1, or about the time exhibit 1 was given, you had any conversation with the Grobbs or either of them with regard to this note on which you were carrying Eli? A. Yes I had a conversation with Eli Grobb first. I had several conversations, I guess, last year, but shortly before I was at him for some security.

Q. In consequence of the conversations that you had with Eli Grobb did you subsequently see Sylvester Grobb? A. Yes.

Q. That is, the plaintiff? A. Yes, the plaintiff.

Q. Where did you see Sylvester Grobb? A. It was in the town of Treherne.

Q. And who were present at that conversation? A. There were 3, the 2 Grobbs and myself.

Q. What took place then, Mr. Darling? A. Well, they agreed between the two of them that they go on the note and release me.

His Honour: Who held the note? A. Mr. MacLennan.

Q. Well then, that would be about the time the note came due, was it, or somewhere about that time A. I expect so: it might have been overdue, I wouldn't be sure.

HIS HONOUR: That is the other note? A. Yes.

Q. Then you say it was agreed that Sylvester and Eli should go on the note and you should be released? A. Yes, that was the agreement.

Q. Now when did you next hear anything about it? A. Well it would be perhaps a month, as near as I can recollect, after that time; it was in Mr. MacLennan's place of business, and he told me—

Mr. Cohen: When did this conversation take place? A. About the time the old note was due.

Mr. Macneil: You saw Mr. MacLennan? A. Yes.

Q. What happened then? A. Well he called me in and he said he guessed he would have to have my signature again on this note.

Q. Did he tell you anything that the two Grobbs had said to him with regard to it? A. Well, he did mention something to me that I was to be released on the notes.

Q. You were going to say when you were interrupted, witness, that Mr. MacLennan told you something Sylvester or Eli Grobb said? A. Yes, he understood the agreement, you know, that they were to try and release me, the two Grobbs, but Mr. MacLennan himself said he didn't feel like releasing me.

Q. And it was then that you— A. Then was the time I put that signature on this (exhibit 1.)

Q. Below these others? A. Yes.

Q. And the other signatures were on? A. They were on several days before that, yes.

Q. You didn't owe either of the Grobbs any money, did you? A. No, none.

MacLennan was called as a witness for the plaintiff, but was unable to remember whether the conversation detailed by the defendant had taken place or not. The plaintiff says he did not go on the note to replace Darling, but to "strengthen the security." Eli Grobb was not available as a witness. No other material evidence was offered.

The trial Judge having found as he did, it does not appear to me an appellate Court should disturb his judgment on facts.

It was argued on the appeal that even if the arrangement detailed by the defendant was entered into, it was never

finally consummated, and, not being supported by any valuable consideration, was nugatory. I cannot accept this view.

As Darling was a surety only on the first note, it was Eli Grobb's duty to pay it at maturity, and a promise by the debtor to arrange it so as to exonerate Darling required no new consideration to support it. To do so was his legal duty, a duty which was enforceable by Darling, the manner of thus doing being a matter of indifference to the defendant.

The real question is, what was the intent of the parties when they signed and delivered the note, exhibit 1. If, with the trial Judge, we believe the defendant's story, the two Grobbs made exhibit 1, intending to use it, without Darling's signature, to replace the old note, and so delivered it to MacLennan. When the plaintiff signed it, he did so as sole guarantor for Eli, and with no intention of sharing in a joint guaranty with the defendant. MacLennan was not satisfied to release Darling on the security of the Grobbs, and himself took the note, exhibit 1, to the defendant, who signed it, not as joint guarantor with the plaintiff, but to continue his liability to MacLennan in case it was not paid by either of the Grobbs. Such being the defendant's story, and the trial Judge believing it, he was right, in my opinion, in dismissing the action.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

RE HARVIE.

Will — Execution — Attestation — Subscription of Witnesses to Affidavit instead of to Attestation Clause—Validity.

Appeal by the executrix and beneficiary under the alleged last will of Elizabeth Harvie from the judgment of the Surrogate Court of the southern judicial district refusing to admit to probate the said alleged last will, and ad-

mitting an earlier writing to probate as the last will. There were infant beneficiaries under the earlier will, on behalf of whom objection was taken to the manner in which the later writing had been executed, and witnesses were called and orally examined as to the facts.

A. McLeod, for the appellant.

A. Haggart, K.C., for the infants.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—It was clearly shewn that the deceased, who was then residing in Portland, Ore., desired to make a new will. A lawyer was called in, and he prepared the will in accordance with her instructions. She was then residing with her daughter, in whose favour the bequests in the will were made. Two persons who lived near by were called in to act as witnesses. The testatrix signed the will in their presence. Instead of requiring the witnesses to sign as such in the usual way, the lawyer added an affidavit at the foot of the will, which was signed and sworn to by both of them. The signature of the testatrix was at the end of the will on the right hand side of the page, and the heading of the affidavit, "State of Oregon, County of Multnomah, U.S.A.," is immediately to the left of her signature. The affidavit then continues across the page underneath the testatrix's signature, and ends on an additional page, the signatures of the witnesses being placed on this additional page at the foot of the affidavit.

The body of the affidavit is as follows: "We, Lizzie Minns and Hugh Minns, each being first duly sworn, each for herself and himself, depose and say that the foregoing instrument, consisting of one page, including this one, was, on the 7th day of March, 1907, signed, sealed, and published and declared by the said Elizabeth Harvie, the testatrix therein named, to be her last will and testament, in the presence of us and each of us, and we, each of us, then and there, at her request, and in her presence, and in the presence of each other, subscribed our names thereto as witnesses."

The evidence shewed that Lizzie and Hugh Minns were asked to come in and witness the will, and that the testatrix wished them to do so. The will was then signed in presence

of the two witnesses. The affidavit of execution was on the will when it was signed, and the witnesses both signed it in the testatrix's presence immediately after she had signed it. The oath appears to have been administered after the witnesses had signed. Hugh Minns was asked: "Did you swear to it at the time" His answer was: "I did, I swore to my signature on the will, my mother and I." He was also asked if he and Lizzie Minns had signed the will in the presence of Mrs. Harvie, the testatrix, and he replied: "We did, as witnesses."

Counsel for the infant beneficiaries contended that the witnesses had not subscribed the present will as required by the statute, but had merely signed the affidavit, which was a separate and distinct document. The Surrogate Judge had given effect to this contention, and had held that Lizzie and Hugh Minns signed the affidavit as deponents in proof, and not as witnesses, and that there was no subscription as witnesses.

The view I take of the evidence is that the witnesses were there for the purpose of witnessing the execution of the will, and that they signed their names with that object in view. It is true that the statute does contemplate the addition of an attestation clause to be signed by the witnesses, although the addition of such a clause is not made imperative. No form is given in the statute for such an attestation clause when used. The affidavit in the present case contains the statements that would be contained in the ordinary attestation clause. The fact that it is sworn to would only make it more solemn in form than is ordinarily required. The contention that the witnesses in signing an affidavit did not also sign the will does not appear to me sustainable. In Griffiths v. Griffiths, L. R. 2 P. & D. 300, it was held that a witness might sign in a dual capacity. Where, therefore, he was asked by the testator to sign the will as executor, but he also intended by his signature to affirm that the testator executed the will in his presence, the execution was held valid.

Much latitude is given by the statute as regards the position of the testator's signature. Where it appears that the testator intended to execute the document as his last will, and where the witnesses clearly intended to attest and subscribe it as such, the tendency of the Courts is to liberally interpret the actions of the parties as a compliance

with the statute, if it is possible so to do without offending against any of the express enactments. I would refer to Roberts v. Phillips, 4 E. & B. 450; Re Streatley, [1891] P. 172; Re Wilson, L. R. 1 P. & D. 269; Re Braddock, 1 P. D. 433.

The witnesses in the present case intended to and did witness the will. They also intended to subscribe it as such witnesses. That they went further and swore to the facts respecting such attestation and subscription, cannot, it appears to me, detract from the validity of the act.

The appeal should be allowed and a fiat granted that probate of the will should issue.

Costs of all parties out of the estate.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

THORDARSON v. JONES.
THORDARSON v. HEALE.

Principal and Agent—Agents' Commission on Exchange of Lands—Agents Bringing Parties together—Evidence—Conflict—Probabilities—Reversal of Finding of Fact of Trial Judge.

Appeal by plaintiffs from judgment of DUBUC, C.J.M.

The plaintiffs, Thordarson & Ollenshaw, were real estate agents in Winnipeg, and the defendant Hedley a farmer residing near Teulon. A deal was made between Heale and defendant Jones, whereby Heale exchanged his farm in the Teulon district for some city property. The plaintiffs had both properties listed with them for sale, and they alleged that they introduced Heale and Jones to one another in their office and actually discussed the deal, which was afterwards consummated between them. The parties went away and concluded a deal between themselves, and the plaintiffs brought separate actions against Jones and Heale for a commission of $600 in connection with the transaction.

DUBUC, C.J., dismissed both actions, and plaintiffs appealed.

A. E. Hoskin and H. Hannesson, for plaintiffs.

J. W. Wilton and E. J. McMurray, for defendants.

The judgment of the Court (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—Actions by a firm of real estate agents for commission on an exchange of lands between Heale and Jones.

Heale had placed 480 acres of land with the plaintiffs for sale. Jones also listed some city lots with the plaintiffs for sale. Plaintiffs allege that they introduced the parties to each other, and, at their instance, an exchange of lands was effected.

There is no doubt that an exchange of these lands actually took place and was carried through between Heale and Jones.

Both plaintiffs gave evidence. One of them states that he introduced the parties to each other in the plaintiffs' office, and suggested that they should make the exchange. The matter was then talked over, he says, between the parties, and they left the office together. The other partner met them as they came out of the office together on that occasion.

Both Heale and Jones deny that they were introduced to each other in the plaintiffs' office. Jones says he was waiting for a friend outside a shop on Main street one Saturday night, that two men were talking on the street, and that he heard one of them say that he had a farm for sale. He called to his friend to hurry up and after the friend came out of the shop they followed the men and overtook them. He then spoke to the man who had said he had a farm for sale. This man was Heale. In that way they became known to each other, and in due course they effected the exchange of properties. The friend who was with Jones at the time says they followed and caught up to a man to whom Jones spoke, although he did not hear the conversation. The man was identified as Heale.

The evidence given by Heale is full of variations and contradictions, and it cannot be regarded as convincing, or even reliable. He also states that the meeting between him and Jones took place on the street as the latter states it did,

and that he met Jones in that way for the first time. That Jones should have heard enough of Heale's conversation with his companion as they conversed on the street to suggest to him that Heale would be a likely person to accept an exchange of property, seems to me to be far from likely. That Jones should be able, when his friend rejoined him, to follow a complete stranger, overtake him and recognize him on a crowded street after dark, is also unlikely. Jones's friend may have seen him speak to Heale, but it is very probable that Jones had already known Heale through the introduction at the plaintiffs' office. Taking the whole testimony of Heale and Jones with its contradictions and the improbability of an introduction taking place in the manner alleged, I feel grave mistrust as to the truth of their story.

The evidence of the plaintiffs seems to be more trustworthy. I think their statement that Heale and Jones were brought together at the plaintiffs' office, where both had listed their lands, and that the exchange of properties resulted from this introduction, is more worthy of belief than the account given by the defendants.

With great respect for the opinion of the learned Chief Justice of the King's Bench, I think the appeal should be allowed, and a verdict be entered in the Court below for one half commission in each case. The parties were merely introduced by the plaintiffs, and they settled the details of the exchange between themselves. The defendants should pay the costs in each case, including those of the appeal.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

STEELE v. PRITCHARD.

Fraud and Misrepresentation—Purchase of Land—Contract not in Fact Induced by Misrepresentation if Made—Contract Previously Made—Plaintiffs Acquiring an Interest—Deceit—Amendment—Evidence—New Contract—Damages—Contract Resulting in Substantial Profit.

Appeal by defendants and cross-appeal by plaintiffs from judgment of MATHERS, J., 5 W. L. R. 263.

The appeal was heard by HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.

H. A. Robson and T. H. Johnson, for defendants.

I. Campbell, K.C., and C. P. Wilson, for plaintiffs.

PERDUE, J.A.:—The statement of claim is based upon a contract in writing dated 25th June, 1906, whereby the defendants agreed on behalf of the Ontario and Saskatchewan Land Corporation to sell to the plaintiffs, that is to say, Steele, Powell, and Buell, the lands in question, being some 48,000 acres, more or less, at $6.60 per acre.

It is alleged that the defendants by fraudulent misrepresentations induced the plaintiffs to enter into this contract.

The contract of 25th June is in the form of a receipt for $5,000 from Steele alone, this being a deposit on the purchase price of the land, the receipt to be followed by a contract in writing between Steele and the land corporation, on the terms set out in the receipt. It transpired that there were not funds in the bank to meet the cheque for $5,000 given by Steele at the time. A meeting took place at the hotel on the evening of 28th June, on which occasion the defendants urged Steele to provide funds to pay the cheque. Powell and Buell were then introduced to Pritchard and Smith, for the first time. The contention of the plaintiffs Powell and Buell now is that the defendants then made the representation which induced them to come into the transaction—that the purchase included all the land which the land corporation ever owned in the townships mentioned.

The trial Judge found that Steele had not been induced by any misrepresentations of the defendants to enter into the purchase. If, then, it be a fact that Powell and Buell came into the transaction subsequently as sub-purchasers, or as acquiring from Steele an interest in his purchase, it is plain that they can be in no better position than Steele himself. After perusing the very voluminous evidence in the case, I am satisfied that Powell and Buell came into the transaction after the sale had been actually made to Steele; that they acquired shares or interests in it under an arrangement made with him; that no new or substituted contract was made by the defendants after the one of 25th June; and that Powell and Buell were only recognized by them as parties who were taking an interest with Steele

in the purchase he had already concluded. In the conversations between the defendants and Powell and Buell the defendants could not have made representations inducing any one to enter into the contract mentioned in the statement of claim, because the contract had been made and its terms settled and reduced to writing three days before the first of these conversations took place. Powell and Buell knew that Steele had already made the purchase, and they had seen the contract of 25th June and discussed it with Steele before they were introduced to the defendants. A strenuous effort was made to make it appear that the contract of 25th June was superseded by a new one made with the 3 plaintiffs on the evening of the 28th. The best answer to this is the fact that the plaintiffs in their statement of claim relied on the contract of 25th June, and said nothing whatever about any contract of the 28th.

The document of 25th June describes the land as "all the lands owned in said townships by the Ontario and Saskatchewan Land Co." This document was in the hands of Powell and Buel before their first conversation with the defendants. They had therefore full information as to what had actually been sold. Powell and Buell now assert that it was represented to them by the defendants on the 28th that the purchase included all the lands the company ever owned in the townships mentioned. Defendants deny this. The description contained in the written document must govern if the first contract is relied upon. But Powell and Buell say that they were anxious to ascertain if the land had been culled or if the best sections were being reserved, before making up their minds to take an interest in it. Accordingly, they inquired as to this and were told, as they state, that the lands included all the company had ever owned in these townships. If what they state is true, Powell and Buell should have brought an action of deceit against defendants for fraudulently inducing them to enter into a contract with Steele whereby they purchased an interest from him. This would be a suit completely different from the present one and would be a suit in which Steele could not be joined as a plaintiff. On the appeal, counsel for Powell and Buell asked for an amendment so as to allow this new action to be set up. To allow such an amendment would mean the framing of a completely new suit which the de-

fendants have not been called upon to meet and in which the party plaintiffs would be changed. It does not appear to me to be a case in which the amendment asked for should be allowed. Notwithstanding the dismissal of the present suit, Powell and Buell may, if so advised, bring a new action upon the grounds urged by their counsel before the Court on this appeal.

The appeal should be allowed with costs, and the cross-appeal dismissed with costs, and the action should be dismissed with costs in the Court below.

HOWELL, C.J.A.:—The facts in this case are set out in the judgment of my brother Perdue, which I have had the advantage of reading.

That the plaintiff Powell was acting for himself and Buell in the negotiations is clearly established on p. 3 of the evidence. The plaintiff Powell is a lawyer, and I shall assume that he knew the ordinary and common principles as to the requirements of written documents in dealings in real estate. Before he saw the defendants he had seen the document of 25th June, obtained by Steele, and he apparently thought it an "option," for he used that term in speaking of it on p. 623. He saw that the document required a payment of $5,000, and he thought the cash payment had been made, and did not discover the error until he spoke to the defendants on the night of 28th June. All this is from the evidence of Powell himself. Steele, at the instance of Powell, gave another cheque upon his own funds to retire and in place of the first cheque (the dishonoured one), and Steele swears the second cheque was given to take up the first one. No other option was given or apparently asked for.

The written option was left with Steele, and he started for Eastern Canada with it in his possession, without any one asking for him to return it. Whether any writing existed between the plaintiffs does not appear.

All the above facts are undisputed.

Powell says that Steele shewed him the option, and then he says, "And I was offered an opportunity to go in with him in the purchasing of that land."

On p. 25 he says: "I went up to these gentlemen, and Mr. Steele introduced me to these men, Mr. Pritchard and Mr. Smith."

Q. "Introduced you to the defendants?" A. "Yes, to the defendants as a man who was going in with him in this deal."

And on p. 50; Q. "Going in with him?" A. "Yes, that is the substance of it." Q. "Going in with him?" A. "Yes."

This introduction of the plaintiff, a lawyer, to the defendants in this language took place when he thought the option valid and binding on all parties.

The defendants both swear they did not make a new bargain on the night of the 28th, but merely got a new cheque to replace the dishonoured one, the consideration for the option. The conclusion, to my mind, is irresistible that the arrangement between the plaintiffs on the night of the 28th was that Powell and Buell were acquiring a share of or a right in this option from Steele, and they then were not re-purchasing from the defendants. If they acquired this right they could place themselves in the position of co-purchasers with Steele on the terms set forth in this option, and the company subsequently recognized this position, and in the agreement from the company to the plaintiffs the date of the option is used as well as all its terms.

In coming to this conclusion on the evidence, it seems to me that I am not reversing the finding of the trial Judge. He finds that the plaintiffs Powell and Buell became co-purchasers with Steele, but to take such a position no doubt there was an agreement between them.

The plaintiffs' position throughout the whole trial was that the defendants made the bargain for this sale with the three plaintiffs, first putting the date as 25th June and then as the 28th.

The trial Judge decided that the plaintiff Steele had no cause of action, and this portion of the judgment has not been appealed against.

If my view of the facts is correct, the only remedy for the other plaintiffs is an action of deceit, wherein it must be alleged that because of fraud of the defendants, the two plaintiffs were induced to enter into an agreement with Steele, the other plaintiff, to acquire an interest in an option or right to become co-purchasers with him in the purchase of a tract of land.

The plaintiffs' counsel, at the trial, suggested some amendments, but none upon these lines, and the trial was not conducted upon any such issue. The deceit alleged in the pleadings and urged at the trial was in negotiating a contract between the plaintiffs and the company, the defendants acting as agents, and not in the negotiation of a contract between the plaintiffs themselves, in which the defendants were not required to take any part and in which perhaps they had no interest. The issues and evidence in these two cases might be widely different, and the trial Judge might have looked at the case in quite a different light and might have refused evidence that was received on the other issue.

I do not think that a new case should be permitted to be made now and the old evidence used to support it.

The appeal should be allowed with costs.

PHIPPEN, J.A.:—Notwithstanding the very able arguments of respondents' counsel, I am compelled to concur in reversing the judgment of the trial Judge. While much evidence was taken at the hearing, and many points were discussed on the appeal, the case can, I think, be disposed of on either one of two well known and generally understood principles of law.

Disregarding all difficulties which the two plaintiffs who succeeded at the trial may have in establishing themselves as parties to an original contract with the vendors, and not merely as purchasers under Steele, and admitting for the moment fraud to be shewn to the full extent claimed, the facts are shortly as follows.

The plaintiffs were induced by the defendants' misrepresentation to pay $5,000 to the Ontario and Saskatchewan Land Corporation, in consideration of which the company gave the plaintiffs a 30-day option to purchase from the company 48,000 acres of land, the deposit to be applied on the purchase money should the option be exercised. Thereafter the plaintiffs became fully informed of the misrepresentations, and later, but within the option period, with entire knowledge of the true facts, exercised the option, applying the $5,000 deposit on account of the purchase money. They then resold the lands at a considerable profit, and afterwards brought this action for deceit, alleging that their profit was less than it would have been had the inducing representations been true.

On the assumed facts the plaintiffs were entitled, on discovering the fraud, to have sued the company for recovery of their $5,000, or to have maintained an action against the defendants in deceit, laying their damages at the amount disbursed. Instead of so doing, they exercised their privilege of making a new contract, directing the company to retain, as part of the purchase money thereunder, the $5,000 previously paid for the option. The plaintiffs, having thus received back the only money from which they were parted by misrepresentation, cannot further recover by way of damages.

The present action is one of deceit. In such an action a plaintiff does not seek to enforce a warranty by asking its performance, otherwise compensation for its breach. It is that the defendant, by his wrongful act, induced the plaintiff to change his position to his detriment. Common sense would not suggest a liability in damages for a person to change his position to his advantage, merely because that advantage might have been greater had the representation proved true.

The law on this point, I take it, is well settled. In McConnell v. Wright, [1903] 1 Ch., Collins, M.R., is reported, at p. 554, as saying: "That obliges me to say something as to the principle upon which damages are assessed in these cases. There is no doubt about it now. It has been laid down by several Judges, and particularly by Cotton, L.J., in Peek v. Derry, 37 Ch. D. 541; but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person connecting was entitled to by his contract to expect to come in, but it is an action of tort—it is an action for a wrong done, whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished. . . . There must be damage suffered by reason of action taken upon misrepresentation."

A different rule formerly prevailed in parts of the United States, but the Supreme Court in the recent cases of Smith v. Boles, 132 U. S. R. 125, and Sigafus v. Porter, 179 U. S. R. 116, has adopted the English rule, so far, at least, as the Federal Courts are concerned. To my mind, that law is sound and, personally, I would unhesitatingly accept it, even in the absence of authority.

The plaintiffs, admitting that the contract resulted to their substantial profit, cannot succeed in damages for having been induced to make it.

In so deciding I do not wish to be understood as holding the defendants guilty of misrepresentation. To my mind, the evidence is most conflicting, and I doubt if it be sufficient to suport such a finding.

I would allow the appeal with costs.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

ROSEN v. LINDSAY.

Fraud and Misrepresentation—Sale of Hotel as Going Concern —False Representations as to Receipts and Profits—Manufactured Settlement—Action for Deceit—Damages—Measure of — No Loss Shewn — Loss of Estimated Profits not an Element of Damage.

Appeal by defendants from judgment of MATHERS, J., 5 W. L. R. 546.

The appeal was heard by RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. B. Hudson, for defendants.

W. Manahan and H. P. Blackwood, for plaintiff.

PERDUE, J.A.:—The plaintiff alleges that by certain misrepresentations the defendants induced him to purchase a certain hotel property. I agree with the finding of the

trial Judge that untruthful statements of the earnings of the hotel and falsifications of the books were resorted to by the defendants to induce the plaintiff to make the purchase. The main question is, however, what damage, if any, has the plaintiff sustained?

In dealing with the question of damages in an action of deceit like the present one, we must, I think, follow the rule laid down in Peek v. Derry, 37 Ch. D. 541, 14 App. Cas. 337. The damages recoverable are the difference between the price paid for the thing purchased and its real value. The real value was in the present case ascertained by the re-sale of the hotel. How much worse off is the plaintiff than if he had kept his money in his pocket? He bought the hotel for $21,000, and 11 months afterwards he sold it for $24,000. It is true that part of the purchase money on the second sale was paid by taking certain farm land at a somewhat high valuation. Making due allowance for this, the excess of $3,000 over the amount paid by the plaintiff would pay the interest for 11 months on the plaintiffs' money after satisfying the deficiency in the value of the farm land.

In addition to what the plaintiff received on the sale of the hotel, it is shewn that he made a clear profit of between $3,000 and $4,000 in operating the hotel for 11 months. He does not appear to have been a success as an hotel manager, and this profit may be considered as a very fair remuneration to himself and his wife for their services during 11 months. The interest on the outlay was covered by the profit when he sold.

It appears to me that the plaintiff has sustained no actual damage by the deceit. I think the action should be dismissed, but without costs in the Court below. As the defendant had to come to this Court, he should be entitled to the costs of the appeal.

PHIPPEN, J.A.:—In Steele v. Pritchard, (ante p. 108), we have adopted the contention of the present appellant, that in an action of deceit a plaintiff to succeed must establish actual loss. The only question we have here to decide is, has he done so?

The defendant sold an hotel to the plaintiff by means of fraudulent representations, supported by false entries in a book to the effect that the hotel had earned at the rate of

$10,000 per annum net. The sale price was $21,000. The plaintiff operated the hotel for 11 months, at an outside profit of $4,000, when he re-sold on the basis of $24,000, accepting in part payment land which it is stated was, for the purpose of the sale, taken at considerably above its worth, but not to an extent which would bring the amount received below the original purchase price. To effect the re-sale the plaintiff paid a commission of undisclosed amount. On these facts the trial Judge entered a verdict for $1,500.

The question which we must primarily decide is, was the hotel, by reason of the misrepresented facts, worth less than the purchase price on the day the plaintiff bought it: Peek v. Derry, 37 Ch. D. 541. In determining this question, we should assume, in the absence of evidence to the contrary, that an hotel of the character represented was reasonably worth only the price paid.

The law on this point appears to be clearly laid down by the Court of Appeal in England in McConnell v. Wright, [1903] 1 Ch. 554. It is probably most tersely stated by Cozens-Hardy, L.J., at p. 559, where he is reported as saying: "As a rule of convenience, and indeed almost of necessity, the property which would have been acquired by the company, if all the statements in the prospectus had been correct, must prima facie be taken to be worth the precise sum paid for the property, neither more nor less. This is the prima facie presumption, and it is sufficient for the decision of the present case, for no evidence has been adduced by the defendant to rebut the presumption." It is true that this particular statement applies to property acquired by the company, not the plaintiff, but that does not affect its recent application.

On this basis the same hotel, if earning under $4,500 per annum, would be worth considerably less than if the net receipts were as represented. The plaintiff himself says that if the truth had been known, he would not have paid more than $12,000 for the property, and to some extent this valuation is supported by other evidence. There is no doubt had he not re-sold, the plaintiff could have recovered substantial damages. Is the presumption of damage which he has raised by his evidence, rebutted by the

fact that 11 months after purchase the plaintiff re-sold the property for substantially its cost? If the sum realized by the re-sale should be attributed solely to the subject matter of the original purchase, undoubtedly this question must be answered in the affirmative, but if intervening conditions attributable to the plaintiff's labour or expenditure have helped to make the price, these conditions must be valued in determining whether in truth a loss be shewn or not.

The hotel was sold to the plaintiff as a going concern. Its license was transferred to the purchaser, and beyond reasonable doubt it was anticipated by the vendor that the plaintiff intended to operate it as an hotel. Had the plaintiff closed it, its saleable value would have been lessened, and its license requirements broken, I think we must assume that to realize the price for which it was re-sold it was essential that the plaintiff keep it in operation.

What really happened is that for his investment, plus 11 months' work, the plaintiff received say $24,000, and his operating profit, or $28,000 in all. What he was entitled to receive so as, on the basis of the purchase, to suffer no loss, was his original investment plus profit for 11 months at approximately $10,000 per annum, or say $30,000 in all. In other words, the plaintiff contends that it was his investment and time which produced the sale price; that the value of this investment and time equalled that which on the representations of the defendant it might reasonably have been expected to produce; that it in fact produced substantially less, and thereby disclosed damages justifying the verdict.

This, to my mind, is the plaintiff's strongest possible case on the evidence adduced, but one which I am unable to adopt. To do so would be to introduce the rule rejected in England, rejected by the Supreme Court of the United States, and to-day by this Court, that, in actions of deceit, the defendant must make good his representations and not merely the loss occasioned. To hold the value of an investment to be the prospective profits based on the conditions represented, and shortage from this standard of profit to be in fact damage, is to compel the defendant in an action of deceit to be responsible as for a breach of contract. The plaintiff might possibly have made a case by

shewing as a fact that while making $4,000 for his 11 months' investment and services, he had in truth lost money because he had given up a more profitable investment or occupation, but, in the absence of such a case, either in the pleadings or evidence, and without expressing an opinion as to the right of the plaintiff to succeed had this case been made, I must hold that no loss has in fact been shewn.

I would allow the appeal with costs. I would not allow any costs below, both on account of the gross fraud of the defendants and because at the time the action was brought the hotel had not been re-sold, apparently justifying the plaintiff in assuming damages.

RICHARDS, J.A., concurred.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

YASNE v. KRONSON.

Fraud and Misrepresentation—Recovery of Money Paid under Contract Induced by Fraud—Cancellation of Contract—Jurisdiction of County Courts.

County Court appeal.

Action to recover a sum of money paid by plaintiff to defendant pursuant to the terms of an agreement for the sale of land. Plaintiff alleged that defendant represented that the land was only 4½ miles away from Haywood station on the Canadian Pacific Railway, but that it turned out to be 10 miles away.

WALKER, Co.C.J., gave judgment for plaintiff for $85, and defendant appealed.

H. A. Burbidge, for defendant.

S. E. Richards, for plaintiff.

The judgment of the Court (HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.), was delivered by

PHIPPEN, J.A.:—This action was brought in the Winnipeg County Court to recover a sum of money paid by the plaintiff to the defendant pursuant to the terms of an agreement of sale which the plaintiff alleges was induced by the defendant's fraud. The agreement is still in force, and, while it so remains, is naturally an answer to any action to recover money paid in accordance with its provisions.

Counsel for plaintiff contends that jurisdiction to cancel contracts on the ground of fraud is conferred upon the County Courts by sub-sec. (b) of sec. 51 of the County Courts Act, R. S. M. ch. 36. In my opinion, that section only confers equitable jurisdiction when the subject of the action is "an equitable claim and demand of debt, account or breach of contract or covenant or money demand, whether payable in money or otherwise." It cannot be construed to give the jurisdiction claimed.

Neither does the plaintiff by his statement of claim ask to have the contract cancelled, nor does the County Court Judge grant such relief. He has simply ordered repayment, allowing the contract under which payment was made to stand.

The appeal should be allowed with costs, and a nonsuit entered in the Court below with costs.

MANITOBA.

NOVEMBER 25TH, 1907.

COURT OF APPEAL.

MITCHELL v. CITY OF WINNIPEG.

Highway — Obstruction by Building Materials — Injury to Bicyclist—Negligence of Municipal Corporation—Notice of Claim—Letter to Chairman of Board of Works—Sufficiency—Receipt by Clerk — Contributory Negligence—Knowledge of Obstruction—Relief over against Owner of Land Obstructing Highway — Independent Contractor — "Premises."

Appeals by defendants and third party from judgment of RICHARDS, J.A., 6 W. L. R. 31.

The appeals were heard by HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.

R. M. Dennistoun and J. A. Machray, for plaintiff.

T. A. Hunt, for defendants.

T. R. Ferguson and I. A. Mackay, for Luce, a third party.

PHIPPEN, J.A.:—As against the city I think the plaintiff is entitled to uphold his judgment. It does not appear that the defendants have established any contributory negligence. On the contrary, the plaintiff seems to have done all that might be expected from a reasonably careful man under unforeseen circumstances, when quick decision was essential to safety.

Like the trial Judge, I have come to the conclusion, with some hesitation, that the notice referred to in the judgment appealed from meets the requirements of the statute. Had it been addressed to and served upon the city clerk instead of the chairman of the board of works, I should not have doubted its efficiency. I think, however, we must treat the letter as handed to Alderman Finkelstein, as the agent of the plaintiff, to do for him what might be necessary in protecting his claim against the city. The letter having reached the hands of the city clerk within the statutory period, in the absence of explanation from the city as to the means of communication, should, I think, be assumed to have been handed in through the plaintiff's agents, and as such to constitute a proper notice within the Act. I feel the more free to come to this conclusion as the object of the statute is to secure to the city notice of such claims, and this appears to have been fully accomplished, within the statutory period, by the communication in question.

To my mind, the street obstruction was the proximate cause of the injury. Without contributory negligence the plaintiff adopted a course, the only one apparently open to him apart from smashing into the obstruction itself, which necessarily landed him at the bottom of an excavation. Whether the street obstruction drove him into an unguarded pit, or a fence, is of moment only as to the quantum of damage received. Falling into the hole was

not a cause but an effect, the result of the street obstruction, against which the owner of the excavated land was not bound to fence. The liability must be determined by reference to the street obstruction alone. To hold otherwise would be to compel an owner to safeguard against another's wrong.

The most favourable finding for the third party is that of the trial Judge, that the contract and materials were taken out of the hands of the contractors on the afternoon of 3rd October. Personally, I am of the opinion that the evidence would support the holding that it was taken over somewhat earlier, although the agreement concluding it was not evidenced by writing until about 5 p.m. on that day. Assuming, however, the learned trial Judge's finding to be correct, on the afternoon before the accident Luce became the complete owner of the materials which then blocked the street. He was himself living on the premises and had full knowledge of the local conditions. He was aware of the volume of traffic passing over the bridge and along the narrow way which his material obstructed. He had been requested by the city inspector to have the street cleared, and had that morning promised to do so. He knew of the incline leading from the bridge to the obstructed street, and must, in the eye of the law, have anticipated the possibility of such an accident as ensued.

Without considering Mr. Hunt's very forcible argument that when Luce took over the material he adopted the trespass, and was thenceforth responsible for subsequent damages, it at least became his duty immediately, so far as possible, to abate the nuisance. Having regard to the character and quantity of material, there would appear to be no reason why it could not, apart at least from the boiler, have been easily removed by a couple of men with barrows in a few hours. In any event the quantity and quality of the obstruction should have been greatly lessened. Nothing, however, was attempted, and it does not now lie in Luce's mouth to say either that with altered conditions and lessened obstruction the accident might still have happened or to evade liability because the impediment which he assumed was originally created by his independent contractor. He should have exercised diligence during the per-

iod of his ownership, and having neglected to do so is liable for the result.

HOWELL, C.J.A.:—I concur with the judgment of Mr. Justice Phippen, which I have read.

It does seem to me that the third party is also liable upon another ground.

In the argument counsel for the third party admitted that the city were clearly liable. If so, the third party's contractor was liable. The building to be erected by the contractor for the third party was to cover the whole of the lot not already built upon. In such cases our senses shew us that in this city portions of the adjoining streets are practically always used for storage of building material. In this case the third party, carrying on business in a building upon the lot, saw from the beginning that his contractor was using a part of the street and obstructing it with material, and he knew that the city officials were complaining about it.

After the third party took over the contract, and after the accident, he in the same manner continued to obstruct the street with building material for the completion of this work.

It seems reasonable to conclude that he expected that the execution of this work would obstruct the street, for, in addition to what is common knowledge in such cases, he saw the obstructions placed there by his contractor, and carried out and completed this work afterwards in the same manner with similar obstruction. If this is a proper conclusion to draw, then the third party cannot shield himself behind the independent contractor.

The appeal of the defendants is dismissed with costs to the plaintiff.

The appeal of the third party is dismissed with costs to the defendants.

PERDUE, J.A., concurred.

MANITOBA.

MATHERS, J. NOVEMBER 27TH, 1907.

TRIAL.

WOLFE v. McARTHUR.

Fraud and Misrepresentation—Contract for Sale of Land—Material Misrepresentation by Vendor as to Situation of Land—Reliance of Purchaser on Statement—Action for Purchase Money—Defence—Rescission—False Representation Innocently Made—Affirmance of Contract—Promise to Pay—Damages.

Action by the vendor of real estate against the purchaser, to recover the purchase price, under the covenant to pay contained in an agreement of sale executed by the parties under seal. The total purchase price was $5,000, of which the sum of $25 was paid before the execution of the agreement, and the balance was payable in instalments extending over a period of years. The agreement was dated 2nd January, 1907, and the first instalment under it fell due on 1st March, 1907. This instalment was not paid, and the agreement provided that, in event of default being made in the payment of principal or interest, the whole purchase money should become due and payable. Pursuant to this provision the action was brought for the whole balance remaining unpaid, and interest.

The action was defended upon the ground that the defendant was induced to enter into the agreement by the fraud of the plaintiff and his agent.

H. A. Robson and E. A. Coude, for plaintiff.

A. Haggart, K.C., and E. J. Tarr, for defendant.

MATHERS, J.:—The property in question consists of two 5-acre blocks, part of a subdivision of the Roman Catholic Mission property situate upon the Dawson road, and the fraud alleged is that it was represented to the defendant that this property was situate on the Dugald road, midway between the city of Winnipeg and the proposed site of the Grand Trunk Pacific Railway shops. In support of this

allegation the defendant produces a letter to him, dated 21st December, 1906, signed "A. Walmsley," which says: "Regarding our conversation at the rink the other night, I beg to quote you $500 per acre (Mission Gardens) on the Dougall road, and being half way between city and G. T. shops. Hurry and see me." A. Walmsley was a clerk in the plaintiff's office, and had authority from him to make sales of property, on which he would be entitled to one-half the usual commission. This letter was delivered to the defendant on the day of its date. On 31st December following he agreed to take one 5-acre block, and paid a small deposit upon it. On 1st January he had an interview with the plaintiff and A. Walmsley, at which J. Walmsley, another clerk in the plaintiff's office, was present. The defendant, at that interview, suggested that he would like to take another 5-acre block of the same property. A few days afterwards the plaintiff saw the defendant again, and at that time exhibited to him a plan of the property, which shewed it to be upon the Dawson road. The plaintiff says that he, at that interview, told the defendant where the property was. Both of these statements are denied. About 7th or 8th January the agreement in question was prepared by J. Walmsley, and taken by A. Walmsley to the defendant, who executed it, and either then or a day or two before paid a further deposit of $5. He had previously paid the deposit of $20 upon the first 5 acres bought. Some time in January the defendant became aware that the property he had agreed to buy was not upon the Dugald road, but he did not then repudiate the agreement or make any complaint to the plaintiff of its location, although he frequently saw and had conversations with the plaintiff. The defendant admits that the first time he complained was towards the end of February, at an interview which he had with the plaintiff upon Logan avenue. The defendant's wife was called to confirm the fact of this interview on Logan avenue, and she says it was in March. I am inclined to think it did not take place until after the first payment fell due on 1st March. In the meantime, before the payment fell due, the plaintiff notified the defendant in writing of the date when the payment would be due. After 1st March the plaintiff again spoke to the defendant, and was told by him that he would make the payment shortly, that he was at that time a little short of money.

I believe that at the time the defendant entered into the agreement in question he believed this property to be situated on the Dugald road between the city and the site of the G. T. P. shops. He had the assurance of the plaintiff's agent in writing that such was its location, and he had no reason to doubt that the representations in that letter were true, and I believe he relied upon them. Although he was afterwards, and before the agreement was entered into, shewn a blue print of the property, from which it appeared that the lots were situate on the Dawson road, that fact may have entirely escaped his notice. In looking at the plan, his mind was fixed upon the relation that the two blocks of land that he proposed to buy bore to each other. He wanted to get them contiguous, and, as he had in his mind the general location of the property, he would not be concerned in any other particulars. I am therefore convinced that he was induced to enter into the agreement upon the representation that the property was located as stated in Walmsley's letter.

In arriving at this conclusion I put very little reliance on the evidence of A. Walmsley. His manner of giving it was not such as to impress me with his truthfulness, and his evidence was much discredited by the fact that it appeared he had made on other occasions many statements that were inconsistent with the evidence he gave at the trial. I base my conclusion largely upon the fact that, as the letter in question undoubtedly was written, and no correction of the statements contained in it made before the agreement was executed, the probability is that the defendant did rely upon the statements it contained. The letter was written with a view to induce the defendant to enter into the contract. The statements contained in it were of such a nature as would probably induce a person to enter into a contract. As stated by Lord Blackburn in Smith v. Chadwick, 9 App. Cas. at p. 196, "it is a fair inference of fact that he was induced to do so by the statements."

The onus was upon the plaintiff to shew that the defendant relied upon his own knowledge, and not upon the false statements in the letter, and I think he has failed to satisfy it. It is not sufficient to shew that he had the means of knowledge, and might have found out the truth. When knowledge is relied upon as a defence, the truth must be

brought clearly home to the deceived: Arnison v. Smith, 41 Ch. D. 369; Kerr on Frauds, p. 416.

The property described in the agreement was much less advantageously situated than that described in Walmsley's letter, and, the evidence shews, was then of a much less speculative value.

The plaintiff was not aware at the time the agreement was executed, and until after default was made by the defendant, of the existence of Walmsley's letter. Walmsley had no experience in real estate matters, and only knew in a general way where the property was situate. I do not believe that in writing the letter he had any intention of misleading the defendant. He knew, however, that the property was not situate upon the Dugald road, and that it was situate upon the Dawson road, and I believe the explanation he made to James Walmsley afterwards was the correct one, namely, that, as the defendant's first name was Dougall, and he was in the habit of so calling him, he inadvertently wrote the word "Dougall" in the letter, instead of "Dawson." The fact that he spelled the name of the road the same way as he spelled the defendant's name, and not as the name of the road is properly spelled, lends colour to the suggestion. I cannot find, therefore, that there was any fraud made use of to induce the defendant to execute this agreement. The representation nevertheless was false, though innocently made.

It was pressed upon me by Mr. Robson that unless the evidence went so far as to bring home to the plaintiff moral fraud or an intention to deceive, the defendant must fail. I do not, however, so understand the law. Whatever may be the effect of an innocent misrepresentation, when pleaded merely as a defence to a common law action, I have no doubt that such a misrepresentation gives the deceived party a right in equity to have the transaction set aside. The law is so laid down by Lord Justice Turner in Rawlins v. Wickham, 3 De G. & J. at p. 317; by Lords Herschell and Bramwell in Derry v. Peek, 14 App. Cas. at p. 357 and 347 respectively, and is summarized in Kerr on Frauds, 100, concluding a review of the authorities: "From all which cases the principle is obviously deducible that a misrepresentation, however honestly made, is a ground for rescission, provided the misrepresentation is material, or, in other words, so different in substance from what it was

represented to be as to amount to a failure of consideration or fundamental error."

The authorities further shew that to represent land as situate in one locality, whereas it is situate in another, is such a difference in substance or fundamental error as would entitle the deceived party to rescission.

The defendant (referred to in error in the 4th paragraph of the defence as the plaintiff) has alleged that the representation complained of was fraudulently made, and has asked to have the agreement set aside. I did not understand Mr. Robson to argue that if the proof fell short of supporting the allegation of moral fraud the defendant would not be entitled to the relief which would follow upon the proof of an innocent misrepresentation. I think he clearly would be so entitled. I am, therefore, of opinion that the defendant is entitled to a verdict, if he has done nothing to affirm the contract.

As I before observed, the defendant discovered the true location of the property mentioned in the agreement, in January, and mentioned that fact to A. Walmsley. I infer from A. Walmsley's subsequent conduct that he did not then make it clear to him that he did not intend to carry out the agreement; and he remained entirely silent, so far as the plaintiff was concerned, until after the first instalment became due. Not only that, but when spoken to about the payment he promised to pay in a short time. An agreement induced by a false representation is not void, but only voidable at the election of the party misled. The defendant was not bound to immediately rescind, and, so long as he did nothing to affirm it, his right of election remained, subject to this, that if while he was deliberating, any innocent third party acquired an interest, or even the wrong-doer changed his position, the right of rescission was gone. In the present case, with a full knowledge of the misrepresentation, and after waiting for a considerable time, the defendant promised to pay. That, I think, was an election to be bound by the agreement, and precludes him now from relying upon the representation in order to void the contract. In Clough v. London and North Western R. W. Co., L. R. 7 Ex. 26, at p. 34, the Court lays down this principle, that if a party, at any time after knowledge of the fraud, either by express words or unequivocal acts, affirms the contract, his election has been determined forever. I

cannot imagine any more express affirmation of a contract than a promise to pay under it. It seems to me, therefore, that the defendant has deprived himself of the right now to object that the contract is void as against him.

There will be a verdict for the plaintiff for $4,975, and interest thereon at 6 per cent., as provided in the agreement, from 2nd January to this date, and costs of suit.

Although the defendant has deprived himself of his right to rely upon the misrepresentation inducing the contract, it may be that he is still entitled to recover any damage he has sustained by reason of the representation, as to which I express no opinion. No such relief was claimed in this action, but in case he desires hereafter to raise that question, this judgment will be without prejudice to his right to do so.

MANITOBA.

MATHERS, J. NOVEMBER 28TH, 1907.

CHAMBERS.

CANADA ELEVATOR CO. v. KAMINSKI.

Payment out of Court—Money Paid into Court by Defendant in Satisfaction of one Cause of Action—Acceptance by Plaintiffs — Conditional Payment in — Payment out — Costs—Rule 530 et seq.

The plaintiffs originally sued the defendant for the price of lumber and for a mechanic's lien on the building in respect of which the lumber was supplied.

The defendant by his defence alleged that one E. Rudy was the contractor for the erection of the house, and by the terms of the contract, which was in writing, he was to furnish all materials and do all the work in the erection and completion of the building, and denied that the plaintiffs ever furnished any material at the request of the defendant. The plaintiffs thereupon, by leave, amended their statement of claim by abandoning the claim for a mechanic's lien, and adding an alternative claim based upon an

assignment to them of the contract alleged by the defendant from the executrix of the E. Rudy estate, and claiming $2,000 in the alternative, either as due to the plaintiffs or to the E. Rudy estate. The defendant delivered an amended statement of defence setting out that the plaintiffs had by their amendment raised a new issue, and that the admissions were made and the money thereinafter referred to was paid into Court in respect of such new issue only.

Paragraph 8 of the defence was as follows: "The defendant brings into Court, as the amount due the Rudy estate, the sum of $853, and is content that the same be paid out to the plaintiffs after payment of the defendant's costs of action." The money was paid into Court on 18th November, 1907, and on 20th November the plaintiffs served upon the defendant the memorandum provided for in Rule 532, accepting the sum of $853 paid into Court in satisfaction of their claim based on the assignment from the Rudy estate.

The present motion was for an order for the payment out to the plaintiffs of this sum of $853. The motion was opposed by the defendant, on the ground that he had attached to the payment out of the money a condition, and that the plaintiffs could not get it out until that condition was satisfied.

A. C. Galt, for plaintiffs.

R. M. Dennistoun, for defendant.

MATHERS, J.:—Rule 530 provides that a defendant may, at the time of delivering his defence, pay into Court a sum of money in satisfaction of the cause or part of the cause of action, or one or more of the causes of action, for which the plaintiff sues, and the money when so paid in shall remain in Court subject to further order, unless the plaintiff elects to take it out; and Rule 532 provides that if the plaintiff takes the money out of Court he shall take it out in satisfaction of the very cause of action for which it is paid in. Rule 534 provides that when the plaintiff takes out money in satisfaction of the entire cause of action he may tax his costs of the action, and may sign judgment therefor, unless the defendant pays them within 48 hours after taxation. I know of no provision in the Rules which permits a defendant who has paid money into Court in satis-

faction of the plaintiff's cause of action, or part of it, to impose any conditions or restrictions on its payment out. I was at first disposed to think that, the defendant having attempted to impose a condition upon the payment out of this money, the defendant should be treated as if the money had not been paid in at all. Further consideration, however, has led me to believe that that is not the proper view. Money cannot be paid into Court except under Rule 530, in satisfaction of the cause or part of the cause of action, or one or more of the causes of action, for which the plaintiff sues, and when it is paid in, it must be treated as paid in under that Rule, and subject to the consequences stated in the subsequent Rules. Once the payment into Court is made, the plaintiff has a right under the Rules to take the money out in satisfaction of the very cause of action for which it is paid in. The defendant having paid money into Court under Rule 530 in satisfaction of one of the plaintiffs' causes of action, he has no power to prevent the subsequent Rules from operating, under which the plaintiffs are entitled to take it out in satisfaction of the very cause for which it was paid in. This is my reading of the judgments of the Court of Appeal in England in Wheeler v. United Telephone Co., 13 Q. B. D. 597, following Goutard v. Carr, printed as a note to that case.

I am, therefore, of opinion that the plaintiffs are entitled to take this money out of Court in satisfaction of the very cause of action for which it was paid in. It was not paid in in satisfaction of the whole cause of action; consequently the plaintiffs would not be entitled to tax their costs under Rule 534. Neither would they be entitled to do so on the other ground, that there is an issue still to be determined which may affect the question of costs: Nixon v. Betsworth, 16 Man. L. R. 1.

An order will, therefore, go for the payment out to the plaintiffs of $853 paid in by the defendant. As the point involved has not hitherto been raised in Manitoba, so far as I am aware, there will be no costs.

MANITOBA.

MATHERS, J. NOVEMBER 29TH, 1907.

CHAMBERS.

RE MORRIS PROVINCIAL ELECTION.

Parliamentary Elections — Controverted Election Petition — Time Limit for Trial—Incorporation by Reference of Provision of Dominion Act—Rules of Court—Practice or Procedure.

Motion by the respondent to dismiss the petition, on the ground that 6 months had elapsed since the petition was presented without the trial having been commenced or any order made enlarging the time for the commencement of the trial.

A. J. Andrews, for the respondent.

J. E. O'Connor and H. P. Blackwood, for the petitioners.

MATHERS, J.:—There is no provision in the Manitoba Controverted Elections Act or in any of the Rules of Court, applicable to election petitions in this province, limiting a time within which the trial must be commenced.

Section 39 of the Dominion Controverted Elections Act does, however, contain such a provision, and the respondent's contention is that secs. 10 and 13 of the local Act incorporate sec. 39 as part of the code of procedure governing petitions under the latter Act.

In interpreting an Act which creates new jurisdictions or delegates subordinate legislation or other powers, the principle of strict construction must be applied. The first Manitoba Controverted Elections Act was passed on 14th May, 1875, and was to a considerable extent based upon the Dominion Controverted Elections Act enacted the previous year. That latter Act did not, however, contain the original of the present Dominion sec. 39, which first appeared in an amending Act assented to on 8th April, 1875. Under the circumstances, I do not think any inference as to the legislative intention can be drawn from the fact that it adopted many provisions of the Dominion statute deal-

ing with practice and procedure, and omitted the provision limiting the time for commencement of the trial. Since that time, however, the local Act has on several occasions been revised and amended.

A distinct and unequivocal enactment is required for the purpose of either adding to or taking from the jurisdiction of the Court: Craies on Statute Law, p. 116. The imposing of a positive limitation on the time within which the trial of a petition must be commenced is a matter of very great importance. It seems to me impossible to suppose that the legislature intended, as it were by a side wind, to bring into operation so important a provision, and the Court will not assume that such was the intention: Smith v. Brown, L. R. 6 Q. B. 729.

The group of sections in which secs. 10 and 13 are found is headed "Rules of Court," thus giving to my mind a plain intimation of the legislative intention that what these sections were intended to bring into force were Rules of Court, as distinguished from the provisions of the statute itself.

Even if sec. 13 is sufficiently wide to include the provisions of the Dominion statute, I think it clear that only such provisions of the statute as the Judges would have jurisdiction to enact, as rules of Court under sec. 10, are brought into force by sec. 13. In dealing with the preliminary objections, I held (6 W. L. R. 742) that sec. 6 of the Dominion Act, which requires the petitioner to verify the petition by affidavit, was not applicable to a petition under the local Act, on the ground that the Judges would have no power to enact such a rule. It seems to me the same reasoning applies to the section now under consideration. A provision which imposes an absolute limitation on the time within which a trial must be commenced is something more than a rule of practice or procedure. A case very much in point is The Queen v. Powlett, L. R. 8 Q. B. 491. The quarter sessions had power to make rules regulating its own practice. Under this power it made a rule that all appeals should be entered with the clerk of the peace on the Saturday preceding the sessions at which such appeals were to be tried. The Court held that such a rule was more than a rule of practice, and that the sessions had no power to make it.

For these reasons, and for the reasons stated in my former judgment dealing with preliminary objections, the application must be dismissed with costs to the petitioner in any event in the cause.

The questions involved are of great practical importance, as I understand the status of several other petitions depends upon the determination of the point raised on this application. It is, therefore, to me a source of considerable satisfaction to know that the respondent may have my decision promptly reviewed by the Court of Appeal now in session.

MANITOBA.

MATHERS, J. NOVEMBER 29TH, 1907.

TRIAL.

FENSOM v. BULMAN.

Contract—Elevators Supplied for Building—Destruction by Fire before Completion—Fire Caused by Imperfections in Electric Work—Acceptance of Elevators by Insuring and Receiving Insurance Moneys—Counterclaim for Amount of Loss—Amendment—Construction of Contract—"Machine" —Quantum Meruit—Defects—Negligence — Entire Contract—Interest—Pleading—Prayer for General Relief.

Plaintiffs sued to recover the balance claimed by them in respect of a passenger and freight elevator, which they had supplied for a building erected by the defendants. The freight elevator was installed and in operation at the time when the defendants' building was burnt. The passenger elevator was on the premises, but was not installed at the time it was destroyed. Defendants refused payment, on the ground that the contract between themselves and the plaintiffs was not entirely completed at the time of the fire. They further contended that the fire was due to imperfections in connection with the electric portion of the work done by the plaintiffs, and they filed a counterclaim for the loss which they sustained.

A. C. Galt and G. D. Minty, for plaintiffs.

J. H. Munson, K.C., and D. H. Laird, for defendants.

MATHERS, J.:—The facts of this case, as I find them, are as follows. In 1904 the defendants were adding four storeys to their two-storey building situate on the corner of Albert and Bannatyne streets in the city of Winnipeg, and they entered into two separate contracts with the plaintiffs for the construction in the new building of a freight and a passenger electric elevator. The single price of $4,500 was named for the two elevators, although there was a separate contract for each, and the terms of payment for each elevator were different. The freight elevator was to be paid, one-half on delivery of the machinery at the building, and the balance on completion; and the passenger elevator was to be paid, one-half on delivery of the machinery at the building, one-quarter "when machine is in place," and the balance on completion. The machinery, with the exception of the grill work for the passenger elevator, was delivered at the building in July, and in August the defendants paid to the plaintiffs one-half the price, namely, $2,250. The condition of the building was such that the plaintiffs could not proceed with the installation of the elevators until the beginning of September, at which time they proceeded to construct the freight elevator. On 23rd September the freight elevator was ready for use, and was turned over to the defendants, and from that time until 11th October was operated by the defendants. After 23rd September the plaintiffs proceeded with the passenger elevator. The motor and winding machinery were put in their place, and the guide rails were distributed on the several floors of the building ready to be erected. The grill work for the elevator had not yet arrived at the building, and the "controller," which was part of the machine, was in the basement of the building, but was not in its place, nor had the building progressed sufficiently that the "controller" could be so placed. On 11th October the building and all its contents were consumed by fire. The placing of the insurance upon the building had been left by the defendants in the hands of W. R. Allan, an insurance broker in the city, and he had insured the building and contents. The total insurance on the building, including $5,000 on elevators, amounted to $41,500, and all the policies were paid in full, the total loss being appraised at something over $50,000.

The plaintiffs allege that the freight elevator was completed, and that they are entitled to be paid the balance due on that elevator. They also allege that the "machine" of the passenger elevator was "in place" and that under the contract they are entitled to be paid one-quarter of the price of the passenger elevator. They also claim in the alternative for goods sold and delivered, their contention on that head being that the defendants by insuring and accepting payment of the insurance moneys have accepted the benefit of their property and work, and that they are therefore entitled to be paid quantum meruit. The defendants deny that the freight elevator was completed, or that the "machine" of the passenger elevator was "in place." They also charge that the fire in the building was occasioned by defects in the machinery due to the negligence of the plaintiffs, whereby they suffered a loss to an amount greater than the plaintiffs' claim. They counterclaim for the amount of this loss, and seek to set it off against the plaintiffs' claim, but they do not seek to recover any excess over the plaintiffs' claim.

At the trial the defendants' counsel applied to increase the amount claimed by the counterclaim so as to embrace the total loss of the defendants, amounting to some $73,000. I reserved the question of allowing this amendment, and permitted the evidence to be given as if the amendment had been allowed. Upon consideration, I think this amendment should not be allowed at this stage. The plaintiffs came to trial prepared to meet a counterclaim for damages amounting only to $1,550, the amount of their claim. I can quite understand that a party in preparing to meet a counterclaim of $73,000 would prepare for the trial in a very different manner than he would if preparing to meet a set-off of $1,550 only. To properly meet a claim based on the total loss of the defendants, to the building, stock-in-trade, and machinery, would involve an inquiry into the cost of the building, the amount of stock-in-trade on hand at the time of the fire, its value, and the quantity and value of the machinery—all matters which the plaintiffs could not be expected to be prepared for on the pleadings as they stood at the time the trial began. To my mind, it would be very unfair to the plaintiffs to permit this amendment, and I therefore refuse it.

The defendants contend that the word "machine," in the contract relating to the passenger elevator, was interchangeable with the word "machinery" where used in the same contract, and that "machinery" meant the whole machinery appertaining to the elevator, not only the operating machinery in the basement, but also the overhead structure, including the pulleys, cables, and car. I cannot, however, accept that interpretation. It seems to me that in the contract the word "machine" was used to indicate something different from the word "machinery." If the contention of the defendants is correct, then the machinery would not be "in place," within the meaning of the contract, until the whole elevator was completed. Whereas it is clear that the placing of the machine and the completion of the elevator do not mean the same thing. It was, however, further contended by the defendants that, admitting that "machine" meant only the operating part in the basement, the "machine" was not "in place" at the time of the fire, within the meaning of the contract. It is admitted that the "controller" was not "in place" when the fire occurred. It is contended by the plaintiffs, however, that the building was not sufficiently advanced to enable the "controller" to be placed, and that for that reason they are entitled to recover as if it were. The same argument might be used with respect to the motor, as it had not been "in place," and the building had not sufficiently advanced to enable it to be placed. The plaintiffs have sued upon a contract which provides that they are entitled to recover one-quarter of the value of the elevator "when the machine is in place." It seems to me that the plaintiffs do not bring themselves within the benefit of that provision in the contract by shewing that part only of the machine is in place. They must shew that they have complied with the contract before they can succeed upon it. If any authority is required for that proposition, it will be found in the recent case of Fairchild v. Rustin, 39 S. C. R. 274, and Ross v. Moon, 17 Man. L. R. 24, 5 W. L. R. 552. I find, therefore, that the plaintiffs are not entitled to recover upon the contract anything more upon the passenger elevator. Had the "machine" been "in place" at the time of the fire, the plaintiffs would have been entitled to recover the instalment which fell due upon that being done, notwithstanding

that the building was destroyed before the elevator was completed: Chandler v. Webster, [1904] 1 K. B. 493.

They claim in the alternative to recover quantum meruit, on the ground that the machine was accepted by the act of the defendants in insuring and collecting the insurance. I am satisfied upon the evidence that the elevators were insured by Mr. Allan, who was in that respect acting as the defendants' agent. Mr. Allan had the plans of the building before him when the schedules were prepared, and saw that provision was made for two elevators. It is true that at that time there were in the building two elevators, one hydraulic elevator running from the sidewalk to the basement, and another small hand elevator for the purpose of raising the stones used by the defendants in their business from the basement to the top floor. It may be that these elevators were also included and covered by the insurance, and it may also be that the hydraulic elevator was included in the estimate of loss to elevators in the proofs of loss. Clearly, I think, the hand elevator could not be, because before the fire it had been entirely dismantled. But whether or not the hydraulic elevator was included, I am satisfied the other two elevators were included. The large amount of $5,000 allowed for elevators cannot be accounted for on any other hypothesis. I cannot find that the new elevators were insured by Allan by instructions of the defendants or that they were aware, when the proofs of loss were made, that these elevators were so included. The defendants' total loss was much in excess of the total insurance, and all they were concerned about knowing was that the several insurance policies were being paid in full. The fact remains, however, that they did receive payment for the loss upon the new elevators. The defendants had paid upon these elevators $2,250. They had, therefore, an insurable interest in them, and had a right to insure them and to receive the insurance money: Clark v. Scottish Imperial Insurance Co., 4 S. C. R. 192; Woods v. Russell, 5 B. & Ad. 942.

Under all the circumstances, I cannot find that the defendants accepted the elevators by reason of the fact that they were insured in the manner stated. There is no evidence, apart from this, of any acceptance. I must therefore find against the plaintiffs' alternative claim.

As to the freight elevator, I am satisfied that it was completed, within the meaning of the contract. It appears that it gave some trouble in operating, but the defendants could not point to any specific defect in the machinery, and I am convinced that it did not cause any more trouble or develop any defects that are not incident to the starting of any new and complicated machinery. The defendants used it from 23rd September to 11th October. The plaintiffs, from time to time, had men working at and making repairs to the elevator. By the contract they were bound to keep it in repair for one year. The last time before the fire that any repairs were made to it by the defendants, of which there is definite evidence, was on 6th October, 5 days before the fire. There is nothing definite to indicate that during this 5 days the elevator did not run well. It was operated by the defendants' employees on the night of the fire, and apparently gave satisfaction, as there is no hint that it did not work well on that night, except the facts hereafter mentioned. The defendants' men were unaccustomed to running elevators. One of them admitted that they were awkward in stopping it, and while he was using it he was prepared at all times to jump out. It is probable that some of its alleged failures to run satisfactorily were due to lack of skill in its management, and that these would have disappeared as the defendants' employees acquired the requisite skill to operate it. I must therefore find that the freight elevator was completed, and that the plaintiffs are entitled to recover the balance payable upon it.

The defendants allege that the fire was caused by defects in the machinery and negligent construction. They say that plaintiffs constructed the elevator in such a negligent, defective, inefficient, and unworkmanlike manner, and of such insufficient and defective material, that the elevator and its attachment permitted and caused the electric current to escape, whereby the elevator and machinery and the defendants' building caught fire and were burned, by reason whereof the defendants sustained damage to a much larger amount than the plaintiffs' claim, which damage they ask to set off. It appears that on several occasions, both at starting and stopping the elevator, there was a considerable flash of flame from the machinery. It does not appear, however, that any of these flashes occasioned any injury

to the building, but that after such flash the machine refused to operate, and the flame continued to escape until the switch was turned. On the night that the fire took place, several of the defendants' employees were working on the upper flat of the building. In going up they had used the freight elevator. About 15 minutes before the fire was noticed, one of the employees had taken the elevator down from the upper flat to the flat below, and had returned with the elevator. A short time before 10 o'clock smoke was detected coming up the freight elevator shaft. On looking down the shaft a red glow was discovered at the bottom. They at once assumed that the building was on fire, and got into the elevator for the purpose of descending. The platform of the elevator was then about 18 inches above the floor. They got into the car and attempted to go down, but it refused to start. They then came down by means of the winding stairway around the passenger elevator shaft. On reaching the ground floor they were in plain view of the freight elevator machinery, and one of them says that the motor was burning; others that it was burning around the machinery. They at once gave the alarm to the central fire hall, situate only a short distance away, and the assistant chief ran across and went to the basement. He says that the fire was in the corner where the machinery was, and was then burning around the base of the freight elevator shaft, and was proceeding up the shaft. The theory of the defendants was that when the elevator was brought to the top floor just before 10 o'clock on this particular night, it was stopped at the floor (although that such was the case is not clear from the evidence), and that the automatic elevator stop had failed to operate, so that the circuit was not open, and the elevator therefore worked up to the position in which it was found, 18 inches above the floor; that the current continuing to pass through the motor caused the arc from which the building caught fire. In answer to this it was shewn that there was a device on the elevator to automatically stop the platform at the upper floor, but if, through any negligence or ignorance of the person operating it, it was allowed to go up farther, when it reached a position 16 or 18 inches above the floor, the counter weight would strike the bottom, causing the rope on the drum to slacken and engage a safety switch which would cut off the current. When this

took place the elevator could not be started until the current was again turned on below. It was further shewn that this safety switch was open after the fire, and that the machine shewed no indications of electrical burning.

There was no specific defect pointed out by the defendants in the elevator or machinery or in its construction, and the only fact upon which I could possibly find that the fire was caused by the negligence of the plaintiffs, or was due to any defects in the machinery, is the bald fact that the fire started in the vicinity of the machinery. The onus was upon the defendants to prove the negligence which they charge against the plaintiffs. It is not sufficient that they should raise a conjecture as to the cause of the fire. Before they can recover against the plaintiffs, they must shew that it was due in some way to the plaintiffs' negligence. In my opinion, they have failed to do so.

The plaintiffs endeavoured to meet the evidence of the defendants as to the cause of the fire by shewing that the floor of the engine room, the door of which was situated about 16 feet from the freight elevator shaft, and the floor of which was about 4 feet below the floor on which the elevator machinery was placed, was littered with a large quantity of paper clippings which had been brought down by the defendants from the upper floor on the day of the fire and left on the engine room floor close to the furnace doors. Their suggestion (because it amounted to nothing more) was that the fire originated in that engine room, and spread from there to the elevator machinery. I think the evidence does not lend any force to this suggestion. In the first place there was no evidence that there was any fire in the furnaces from which this paper could be ignited, and in the second place, the assistant chief of the fire brigade, who went down into the basement within 10 feet of the fire, and was in a position almost directly opposite the furnace room door, swore positively that no fire was coming from that door. There was no other place from which the fire could get egress from the furnace room, as it was surrounded by a brick wall. I must hold, therefore, that the defendants have failed to establish any negligence on the part of the plaintiffs which would enable them to recover on their counterclaim, and also that the plaintiffs have failed to prove that the fire was in any way caused by

the defendants' negligence. The plaintiffs do not allege any such negligence, but, as considerable evidence was given upon the point, I think it proper to state my finding.

The defendants allege that the price of the two elevators was an entire price of $4,500; that the contract was therefore an entire contract; and that the plaintiffs cannot recover anything until the completion of the contract; that, as the failure to complete was not due to defendants, the plaintiffs are not entitled to recover. It is quite true that the price fixed is an entire price. The contracts, however, are separate and distinct, and provide a different time of payment for each elevator. I think it was open to the plaintiffs to shew, as they have done, how the $4,500 should be apportioned between the two elevators. The evidence shews that of that sum $2,800 was for the passenger elevator and $1,700 for the freight elevator. There will be judgment for the plaintiffs for $850 and costs of suit. The defendants' counterclaim will be dismissed with costs.

On settling the minutes of judgment, the plaintiffs asked to have interest added to the amount of the verdict. Interest is not asked by the statement of claim, nor does it contain any allegation upon which such a claim could be based. If a case for the allowance of interest were made by the plaintiffs' pleading it could be properly allowed under the prayer for general relief: Johannesson v. Galbraith, 16 Man. L. R. 147, 3 W. L. R. 275. But this could only be done where the allegations in the statement of claim support a claim for interest. Where, as here, the claim is based upon a contract to pay interest that fact should have been alleged: Bullen & Leake, 6th ed., p. 211; Sheba Gold Mining Co. v. Trubshawe, [1892] 1 Q. B. 674.

It has long been the practice both at common law and in equity that where a claim for interest is based upon a contract, a case for its allowance must be made in the pleadings, otherwise it is not recoverable: Bullen & Leake, 3rd ed., p. 52; Daniel's Chancery Practice, p. 372; Weymouth v. Boyel, 1 Ves. Jr. 416. As the pleadings stand, no interest can be allowed.

BRITISH COLUMBIA.

MARTIN, J. JUNE 14TH, 1907.

CHAMBERS.

BRYCE v. CANADIAN PACIFIC R. W. CO.

Costs—Taxation—Increased Counsel Fees—Trial of Actions—Discretion—Principles Governing—Practice in Applying to Judge for Fiat.

Motion by the defendants for a fiat for increased counsel fees on the trial of 6 consolidated actions.

Peters, K.C., J. Martin, K.C., and Bowser, K.C., for the plaintiffs.

Bodwell, K.C., Davis, K.C., and MacMullen, for the defendants.

MARTIN, J.:—Seeing that applications of this kind are of late becoming more frequent (probably in view of the recent greatly increased cost of living, which doubtless compels solicitors to brief leading counsel correspondingly), it seems opportune for the information of the profession to give my reasons for granting the application, so that it may be some guide on future occasions.

These cases, though tried together, yet involved some distinct issues, so I decided that it would be proper to allow each side to be represented by three counsel, regarding, for the purposes of taxation, two of them as seniors and one junior. The Court was assisted by two nautical assessors, and the matters in issue were of unusual importance and of a nature to require sustained close attention. The Court sat on 8 days, 5 of which were long sittings, generally from 10 to 5 with one hour's adjournment for lunch, and the 3 others were from ¼ to ¾ as long, these broken days being caused by the usual Saturday half holiday, and the unexpected detention en route of a witness from a great distance. I mention this because no delay was caused by any oversight on the part of counsel or solicitors.

Now the mere fact that a case lasts many days is not to be taken as a ground for increased counsel fees—because cases are but too often, at great expense to the litigants

and the inconvenience of all concerned, regrettably protracted by unpreparedness, unpunctuality, long unnecessary adjournments, and unduly short hours of sitting. But, on the other hand, where a case is conducted, as was the one at bar, with skill, punctuality, and despatch, there results a great saving of expense and valuable time, not to speak of the minimizing of inconvenience to a large number of persons, which should be recognized by the Court, because what should primarily be regarded is not the mere time taken up by a trial, but the skill displayed in the handling of it. In other words, it is quality and diligence, and not quantity and delay, that govern my discretion.

It is just, therefore, in this case that effect should be given to the foregoing principles, and in applying them to the facts (which must differ more or less in each case) I have decided to allow a fee of $800 to one of the leading counsel, Mr. Bodwell, and $750 to the other, Mr. Davis, who was absent on one day's fractional session. To the junior, Mr. MacMullen, who did not formally appear at the 3 sittings in Victoria, I allow $225.

Because of some uncertainty in the practice, I take this opportunity of stating that applications for fiats are not made on a formal summons: a notification by letter to the other side of intention to apply at some convenient hour is sufficient. The applicant should have with him, for convenient reference, a memorandum (not certificate) from the registrar shewing the hours of sitting and the highest fees that the tariff permits him to tax on his own discretion. No argument is heard, but merely a statement is made of such facts as are necessary for the exercise of the Judge's discretion.

BRITISH COLUMBIA.

NOVEMBER 18TH, 1907.

FULL COURT.

BANK OF MONTREAL v. THOMSON.

Summary Judgment — Order XIV. — Writ of Summons — Special Indorsement — Amendment — Additional Claim — Particulars—Practice.

Appeal by defendant from an order of FORIN, local Judge of the Supreme Court, at Chambers, in Nelson, upon

an application by plaintiffs under Order XIV. for summary judgment for $2,056.48, the amount claimed by the plaintiffs by the indorsement upon the writ of summons in an action upon a promissory note. The indorsement and the affidavit in support of the application referred only to the note. Particulars, being ordered, were delivered, but not verified, and they included a guaranty, as well as the note. They also shewed that certain moneys had been paid, which had been appropriated on account of the guaranty, and judgment was given for $1,382.04, and leave given to amend the indorsement on the writ of summons by adding thereto the particulars delivered.

The appeal was heard by HUNTER, C.J., MORRISON and CLEMENT, JJ.

W. A. Macdonald, K.C., for the appellant. We object to the indorsement as being insufficient and defective. Under Order XIV. plaintiffs must shew strictly what they claim to enable the Court to give judgment. There is no verification of the claim by affidavit. Subsequently certain particulars are filed, which, instead of substantiating the claim made in the indorsement, shew an alleged indebtedness for a different and smaller amount. This is not permissible under Order XIV. He referred to the Annual Practice, 1907, p. 116: Lloyd's Bank v. Ogle, 1 Ex. D. 262; Fruhauf v. Grosvenor, 61 L. J. Q. B. 717; Union Bank of Hamilton v. Wurzburg, 9 B. C. R. 160. (He was stopped.)

Senkler, K.C., for the plaintiffs. Under Order XIV., in the new Rules, it is now discretionary with the Judge to give judgment, and he may amend at the hearing. Here the indorsement is correct under the Rule, coupled with the particulars given as delivered. The latter shew the amount due, and for which we recovered judgment. Defendant has never alleged by affidavit in answer that he is not indebted, and in the absence of such denial we are entitled to proceed.

PER CURIAM:—Walker v. Hicks, 3 Q. B. D. 8, is an authority that such particulars must be given a defendant as to enable him to see whether he shall admit the claim or resist it. The Court is agreed that this appeal should be allowed, as such an indorsement offends against the dictum laid down by Lord Chief Justice Cockburn in the case just

referred to. It was incumbent on the plaintiffs, as soon as they knew that payment had been made, to have had their indorsement amended, and thereby enable the defendant to see whether or not he should resist.

Appeal allowed.

BRITISH COLUMBIA.

HUNTER, C.J. NOVEMBER 22ND, 1907.

CHAMBERS.

REX v. FOUR CHINAMEN.

Criminal Law—Keeping Common Gaming House—Jurisdiction of Police Magistrate—Summary Trial without Consent—Criminal Code, sec. 774—Disorderly House—Gaming House.

Applications by defendants to quash their convictions for being keepers of a common gaming house, recorded by the police magistrate for the city of Vancouver, assuming to exercise jurisdiction to summarily try the defendants, without their consent, under sec. 774 of the Criminal Code.

Farris, for the defendants.

Killam, for the Crown.

HUNTER, C.J.:—The chief ground and the only ground on which I reserved judgment was that the expression "disorderly house" in sec. 774 of the Code does not include gaming house, but is confined to houses of the same character as houses of ill-fame.

Judicial opinion is at variance on the subject: the Court of Appeal in Quebec has adopted this view in The Queen v. France, 1 Can. Crim. Cas. 321, while it has been held by Drake, J., in Ex p. Cook, 3 Can. Crim. Cas. 72, and by Craig, J., in the Yukon in Re Rex v. Flynn, 9 Crim. Cas. 550, 1 W. L. R. 388, 2 W. L. R. 468, that the phrase includes common gaming houses.

In my opinion, the term "disorderly house" has acquired in criminal jurisprudence a definite legal meaning,

and that it includes any house to which persons resort for criminal or immoral purposes, and it is immaterial that the house is conducted quietly so as not to disturb the neighbours: Regina v. Rice, L. R. 1 C. C. R. 21.

Section 228 of the Code singles out certain classes of disorderly houses, viz., bawdy houses, gaming houses, and betting houses, and provides that their keepers shall be liable to conviction on indictment and to a year's imprisonment: while other classes of disorderly houses such as disorderly inns, places of entertainment, etc., are left to be dealt with by the common law, and I think this is sufficient to shew that, in the mind of the legislature, the phrase has the wide general meaning alluded to.

There is nothing in the point that the phrase "keeping or being an inmate or habitual frequenter" is more commonly associated with the idea of bawdy houses, as the words may be read distributively, while the argument that the language is redundant cuts both ways, as, from one point of view, "disorderly house" is unnecessary, while, from the other point of view, "houses of ill-fame or bawdy houses" is unnecessary.

Applications dismissed.

[The Court of Appeal for Ontario have, since this decision, followed The Queen v. France, 1 Can. Crim. Cas. 321, in Rex v. Lee Guey, 10 O. W. R. 1060.]

BRITISH COLUMBIA.

NOVEMBER 23RD, 1907.

FULL COURT.

STAR MINING CO. v. BYRON N. WHITE CO.

Mines and Minerals—Trespass Workings—Following Veins—Evidence—Inspection—Conflicting Theories—Determination of Court — Appeal — New Evidence — Reversal of Judgment at Trial.

Appeal by plaintiffs from judgment of HUNTER, C.J., 2 W. L. R. 411, 12 B. C. R. 62, dismissing the action.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

E. P. Davis, K.C., and S. S. Taylor, K.C., for plaintiffs.

E. V. Bodwell, K.C., and R. S. Lennie, for defendants.

IRVING, J.:—This is, in one sense, an appeal from the judgment of the Chief Justice, but, owing to the turn events took after he had delivered his judgment, we are called upon to decide the case upon evidence not adduced before him.

. . . . .

[Statement of facts.]

On 25th February counsel for the plaintiffs, referring to the issue of fact which had been gradually developed during the trial, and fully stated by Mr. Sizar, proposed that certain work should be done, and that that work should determine the issue. This was agreed to, in a more or less indefinite way, but the examination of witnesses proceeded. Like the evidence on behalf of defendants, it was, in the main, the testimony of experts and persons interested in the result, and at the close of it the trial Judge seems to have felt that he was not then in a position to give a decision, and that therefore some further work was necessary. It was accordingly arranged that some work should be done under the superintendence of a Mr. Parish, but, owing to illness, Mr. Parish had to resign, and so matters remained at a standstill until December, 1904, when the Chief Justice himself, accompanied by the leading experts on each side, paid a 3-days' visit to the mine. This inspection by the Judge, accompanied by the experts, I see by the decree, was a consent arrangement. I think it is to be regretted that counsel did not also attend, for, instead of adhering to the plan originally agreed upon, viz., that work should be done to test the soundness of Mr. Sizar's contention that there existed 3 separate fissures, the Chief Justice thought it would be sufficient to enable him to reach a conclusion if a drift was run from C. to a point 27 feet east of D., or, as it has been called, D. minus 27, that is, instead of testing Sizar's black fissure theory, which test required a drift through the Star hanging wall, with cross-cuts at the south and a cross-cut at X. (two experiments which Mr. Sizar said would either prove or disprove his theory), a wholly different piece of work was directed to be done. As to this work and why it was ordered at

this particular place I shall refer later. To the substitution of this one piece of work for that originally agreed upon, objection was taken at once by the plaintiffs. In January, 1905, while the new work, i.e., the drift from C. to 27D., was being run, an application for other work was made, and that application was renewed in May, 1905, about which date the Chief Justice, accompanied this time by Mr. Oscar White, the defendants' manager, and Mr. Fowler, an expert retained by the plaintiffs, made a second examination of the mine. To both of these applications there was a refusal, with the result that on 25th July, 1905, when the case came on again for what has been called the second trial, the work, for the doing of which the hearing in February, 1904, had been adjourned, was still undone. Once more the plaintiffs applied for further experimental work, but this was not granted, and the trial proceeded, and judgment was reserved.

At the close of the trial the same application was made for more experimental work, with the same result; and in the end judgment was given in favour of the defendants: 12 B. C. R. 62, 2 W. L. R. 411.

The learned Chief Justice proceeded on the ground that the 5th level shews that the vein was continuous, and that between C. and D.27 there was a clearly defined hanging wall, and the characteristic vein filling, which was to be found in the Slocan-Star and Silversmith, was to be found in the cross-cut run between those points by his direction in December, 1904.

From that judgment an appeal was taken to this Court, and at the same time an appeal from the interlocutory decision refusing to allow the experimental work to be done was also taken. After argument, this Court came to the conclusion that the plaintiffs should have been allowed to have the work done which they contended was necessary for the proper presentation of their case, and we therefore set aside the judgment of the learned Chief Justice and directed the work to be done, at the places mentioned by Mr. Sizar in his examination in February, 1904.

The parties to the action selected a Mr. Zwicky as a proper person to have the management of the work, and under him it was proceeded with and finished about February, 1907, and the case came on before us in April last.

Some question has been made as to the convenience of the course adopted. Perhaps it has thrown on this Court a greater amount of work than we expected, but it seems to me to have been the only satisfactory solution of the problem we have had to deal with, and as for precedent, we have our own action in Hopper v. Dunsmuir, and also the Stanley Park Case. And I see that the Judicial Committee of the Privy Council has, instead of remitting a case to the Court at Shanghai, allowed evidence (taken it is true on commission) to be presented to them in the first instance: see Bank of China v. American Trading Co., [1894] A. C. 271.

Looking back now, I feel that we should have experienced the very greatest difficulty in following the complicated details of this case, if we had proceeded in the ordinary way.

Before proceeding with the statement of facts of the case as developed before us, I would like to make an observation with reference to a contention of Mr. Bodwell that he had a judgment in his favour and that it was for the plaintiffs to upset it. I do not look at it in that way. In our opinion the case before the learned Chief Justice had not been fully tried, and, therefore, we directed that there should be practically a new trial. It would be altogether out of reason to regard a judgment which had been reached, at any rate in our opinion, without full opportunity to plaintiffs to establish their case, as a judgment shifting the onus from the defendants, on whom it was originally cast, on to the plaintiffs.

From the reasons for judgment given by the learned Chief Justice, it is apparent that he relied very much on his own inspection of the premises, as he was, after having made such an examination, able to decide which of the experts was right and which was wrong.

Now, since then, we have had the advantage of the additional work and verbal evidence on both sides, and, although we should pay due regard to the opinion of the witnesses formed by the Chief Justice, yet it is for us to form our opinion as to their credibility.

The new work consisted of three separate undertakings: one at the south where the plaintiffs had said the Slocan-Star vein was cut off and terminated by the black fissure; the middle piece where the defendants had asserted the No.

a vein would be found, to which vein they attributed certain ore found in the black fissure; and the northerly piece of work which the plaintiffs had said would demonstrate that the wall of crushed material did not stop or turn at B., but continued on to X. and beyond.

The new work at the south, in my opinion, completely established the theory contended for by the plaintiffs as to the separate existence of the black fissure. It shewed positively beyond question that the hanging wall on No. 5 level and the slopes immediately above it, were not continuous, but that a fissure with a filling similar to that found in the black fissure ran out to the south. . . .

[The learned Judge then set out and referred to the evidence at great length.]

I think the defendants' case has failed. Judgment should therefore be reversed, with costs here and below. The judgment should direct an inquiry as to the amount of ore taken, and contain a declaration that the Slocan-Star location does not give to the defendants any rights to the west of the west end line of that claim, and that the vein or lode on the Silversmith location has not been shewn to extend to the Rabbit Paw or Heber Fraction. There should be an injunction also, but the terms of the judgment had better be spoken to later.

MARTIN, J.:—Two questions are submitted by the plaintiffs (appellants) for our consideration, one of fact and one of law. If the former is determined in their favour, the latter becomes immaterial, therefore I shall deal with the former.

At the outset I find myself in an unusual position, for, though nominally sitting as a Judge of appeal, yet this Court has for many days been discharging the functions of a Court of first instance, of a jury in fact, during the hearing before us (from 8th to 23rd April, inclusive), having taken a great mass of oral evidence, amounting when extended to 675 type-written pages.

This from every point of view undesirable, and I trust not-to-be-repeated, departure from the practice in the case of non-reception of evidence by the trial Judge, places the parties and the Court in a peculiar position, for we have no finding of fact to assist us, because the evidence we took, and which is quite inextricably interwoven with that taken

at the trial, was not before the trial Judge, so the issues are open and must be found by us. Such an unusual state of affairs affects the case seriously, because the usual onus thrown upon the appellants to "shew the judgment appealed from is wrong" is absent (see Inverarity v. Hanington, 27th April, 1907, not yet reported, and the authorities therein cited); and, on the other hand, the original onus cast upon the defendants in actions of this class to justify their encroaching workings is as strong as ever, and as important.

The extent to which this latter onus goes in cases of this nature has been considered in many American cases to which we have been referred, and which we must look to for guidance, since this difficult and distinct branch of our mining law came direct from that country, and there has been some difference of opinion in applying it to various circumstances. But in a case such as the present I adopt the following remarks of Hallett, J., in Leadville Mining Co. v. Fitzgerald, 4 Morr. Min. R. 381, cited in Lindley on Mines, 2nd ed., vol. 2, sec. 866, wherein the whole question is ably considered: "Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can shew a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall shew by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere."

In Snyder on Mines (1902), vol. 2, sec. 783, it is, I think, accurately stated after a review of the cases: "While, as we have seen, this extra estate is given to every locator of a mineral vein and confirmed by the patent, if he obtains one, it is strictly upon the condition that he so establish his lines upon the surface as to include whatever portion of his vein he desires to mine outside the vertical planes of his surface ground, for, however right or wrong the law may be, and notwithstanding there is a severance of estate, as we have seen, the rule is firmly established that the common law maxim applies, and that agreeably hereto until a better right is shewn, he who owns the surface is presumed to own all beneath."

And in Barringer & Adams on Mines (1900) the conclusion is reached (pp. 442-3) that: "The presumption in the first place is that all minerals found within his boundary planes belong to the owner of the claim. And upon a stranger claiming the right to mine inside of these planes rests the burden of proving that he is mining upon the dip of a vein whose apex is outside of the claim, and within a claim belonging to him. That is, in order to establish his right and justify the apparent trespass, he must prove that he is the legal possessor of the vein which he is following. If he fails to establish both of these points he is a trespasser."

And see also p. 458.

The circumstances of the case at bar are such that, as Lindley says, sec. 866, p. 1592; "It devolves upon the defendant company to establish: (1) the existence of an apex within the boundaries; (2) the identity and continuity of the vein from its top or apex within such boundaries to the point in dispute."

In regard to No. (2) Lindley observes, sec. 615, p. 1112: "The legal identity or continuity of a vein on its downward course, as well as on its longitudinal course underneath the surface of adjoining lands, presents at times the most serious questions encountered in the administration of the mining law. It is impossible to prescribe any definite rule as to what degree of continuity or identity in a legal sense the miner must establish when he invades property adjoining the location containing the apex of the vein. Each case presents its own peculiar features. Reports of adjudicated cases rarely present general discussions of this feature of the mining law, nor are the facts usually stated with such detail as to enable the practitioner to utilize the case as a precedent. The infinite variety of structural conditions encountered in the practical operation of mines renders it highly improbable that a case in one locality can be safely relied upon as a precedent in a case arising in another place."

And he goes on to discuss certain general principles as illustrated by leading cases. At a trial of this kind in the American Courts these questions of fact are left to a jury, and the Judge's charge is frequently given in full in the law reports. Our duty, therefore, acting as a jury, is to charge ourselves on the facts before us and return a

verdict thereon. In such circumstances, as I have before now stated, I do not think it is a good practice or otherwise profitable to attempt to give here a critical analysis (and anything short of that would be quite useless) of all the great mass of conflicting evidence of fact and theory that has been adduced, and on this point I refer to Leadbeater v. Crow's Nest Pass Coal Co., 2 M. M. C. 145, wherein I said in a coal mining case: "In support of these conflicting theories a great body of evidence was adduced in a trial lasting more than three consecutive weeks, and, even if it were desirable for me to do so when discharging the functions of a jury on pure questions of fact (and I do not think it is), it would be almost an impossibility to attempt to review in detail all the evidence which I have listened to and weighed in a trial of such duration and complexity of fact, though not of issue."

All therefore that I propose to say in the present case is that the defendants have failed to discharge the onus cast upon them to satisfy me, as a jury, regarding the identity and continuity of the vein in question. Though Mr. Bodwell presented his case to the best advantage, yet his able argument did not carry me beyond the doubtful stage, and consequently I think the only safe course to adopt is to confine the defendants to their own ground as against the plaintiffs.

The appeal should, in my opinion, be allowed.

MORRISON, J. (dissenting):—This is an action for damages and an injunction against the taking of ore from the plaintiffs' mineral claims known as the Rabbit Paw and Heber Fraction.

Markedly divergent theories were advanced at the trial, and when it was deemed advisable that the workings and condition of the mine should be inspected, the learned trial Judge, accompanied by two engineers selected by the respective parties hereto, visited the mine, ordered certain additional work to be done, and then had a second view. From the voluminous evidence before us, I gather that a thorough inspection was made. At the close of the evidence following this view of the locus in quo, counsel for the plaintiffs requested that further work be done, on the ground that not enough had been done to establish his theory, and that, without additional work as indicated by

him, it was useless for him to proceed with his case. This was refused, and the learned Judge then gave the judgment appealed from, which is a result, mainly, of his inspections. Upon appeal to this Court, such leave, however, was given the plaintiffs to have certain further work done, and to advance, if necessary, such further evidence as the parties might be advised respecting the issues as developed at the trial. Pursuant to this leave, the work was done by a Mr. Zwicky, and in due course his evidence and that of the chief witnesses at the trial, as well as the evidence of a Mr. Boehmer, an American expert, was given before us on this appeal.

From a close reading of the proceedings on appeal, I cannot discover any tangible evidence. It is all highly theoretical, not to say rhetorical, and the arguments of counsel were equally vituperative.

With regard to the position in which the plaintiffs' counsel considered he stood at the close of the trial, it seems to me necessary for him to adduce evidence of a nature much stronger than before, to establish his theory. If this new evidence does not add to, but simply reaffirm, the previous evidence, it is not enough.

Otherwise, giving the fullest effect to both sides, apart from the question of onus, which I submit now is on the plaintiffs, the net result would be as before, one theory opposed by the other; but with this difference, that the defendants are supported by the opinion of the learned trial Judge, based mainly upon his inspection, and so should prevail with us.

I joined in the order for the performance of the new work solely in the belief created by the strenuous argument of counsel that the new work would clearly demonstrate the contention of the plaintiffs, and, had I anticipated that the result would be to afford a breathing spell for a resumption of the wonderful display of theories as to the formation of the earth's interior by clever experts, I should have hesitated before concurring.

The leading respective experts appear to be men of ability who advanced diametrically opposite scientific theories. They assumed that position before the trial Judge, and maintained it steadfastly in giving their evidence on appeal.

The trial Judge, however, not only heard their theories, but, as it were, saw those theories worked out. One who hears a man tell how he performed a certain piece of work is not in so favourable a position to determine the nature of the work performed as if he saw him do it, or saw the work after it was done.

For my part, I find it as difficult to appreciate the value of the voluminous evidence in this case, as it is to understand the extent, trend, and course of the different subterranean formations by handling the small fragments of "rock" produced as exhibits, and about which there is such a hopeless divergence of scientific opinion.

The proof must be clear and unmistakable. And in respect to this new work ordered by us to be done, I do not think it is either. The evidence is so perplexing that, taking it alone, one must arrive at the conclusion urged upon us by the plaintiffs by a process of guess-work and surmise. Indeed, so inconclusive is this new evidence, that a view by this Court is as necessary as it was by the trial Judge.

This may not be an inopportune time to emphasize the necessity for a change in the law whereby a view by the Judge and two assessors shall be conclusive as to questions of fact, leaving an appeal only on questions of law.

I would dismiss the appeal.

BRITISH COLUMBIA.

NOVEMBER 28TH, 1907.

FULL COURT.

HOFINS v. LENORA MOUNT SICKER COPPER MINING CO.

Practice—Dismissal of Action as Frivolous and Vexatious—Application to Make Party Plaintiff a Company already Defendant—Fraud, Allegation of.

Appeal by defendants Bryden and Tupper from an order of HUNTER, C.J., at Chambers in Victoria, on 23rd January, 1906, refusing an application for an order dismissing the action as frivolous and vexatious.

In November, 1905, the defendant company borrowed money from one Thorne, and gave a mortgage to secure repayment. Certain payments had been made on account of this loan, when the company applied for a loan of $55,000 to the defendants Bryden and Tupper, trustees of the Dunsmuir estate, who, instead of taking a mortgage direct, took an assignment of the Thorne mortgage, which it was intended should be kept alive as security. A creditor of the company attacked the transaction, and failed. Then the plaintiffs commenced suit, raising the same issue, namely, that the Thorne mortgage was fully paid off. Before delivery of the statement of claim, defendants Bryden and Tupper applied to have the action dismissed, on the ground that such an action could only be brought by the company, whereas the company was a defendant. Plaintiffs then offered to amend by making the company plaintiff, and were given 7 weeks to obtain leave to do so from the winding-up Judge, or in default the action to be dismissed. They did not obtain this leave, but filed a statement of claim, in which fraud was alleged. Defendants filed affidavits alleging bona fide advance of the money in question, but HUNTER, C.J., before whom the application was argued, dismissed it and allowed the matter to go down to trial. Plaintiffs' application to add the Lenora Company as plaintiffs was also dismissed. Defendants Bryden and Tupper appealed.

The appeal was heard by IRVING, MORRISON, and CLEMENT, JJ.

Sir Charles Hibbert Tupper, K.C., and Martin Griffin, for the appellants. Plaintiffs filed no evidence in support of their applications, and did not cross-examine defendants on their affidavits. Unless the Judge is satisfied that the case can be made a triable one, and if the plaintiffs have pinned their faith on one point, which they have abandoned, then we are entitled ex debito to a dismissal of the action. They cited Annual Practice, 1907, p. 312; Dawkins v. Prince Edward of Saxe-Weimar, 1 Q. B. D. 499; Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489; Lawrance v. Norreys, 15 App. Cas. 210; Willis v. Earl Howe, [1893] 2 Ch. 551, at p. 554; Fletcher v. Beatham, 41 W. R. 621; Remington v. Scholes, [1897] 2 Ch. 1; The Manar, 72 L. J. P. 95; Salaman v. Secretary of State for India, 75 L. J. K. B. 419;

Whiteside, for respondents (plaintiffs). Cooper v. Yorkshire Guarantee Corporation, 11 B. C. R. 97, is conclusive here. Evidently the learned Chief Justice was not of the impression that the action was obviously unsustainable. We are not bound to defend the action by affidavit on an application of this kind.

Tupper, in reply. Cooper v. Yorkshire Guarantee Corporation, supra, is not applicable here; an inferential allegation of fraud is not permissible.

IRVING, J.:—I think I am bound by the decision in Cooper v. Yorkshire Guarantee Corporation, supra, and for that reason would dismiss the appeal.

MORRISON, J.:—Speaking for myself, I think the case of Lawrance v. Norreys, supra, bears a striking similarity to this, and the language at p. 219 in the report of that case is very appropriate here. Cooper v. Yorkshire Guarantee Corporation is not quite analogous. I would allow the appeal and dismiss the action.

CLEMENT, J.:—I agree with my brother Morrison. There is no affidavit of belief on the part of the plaintiff in the case which he has set up in his statement of claim.

Appeal allowed.

BRITISH COLUMBIA.

NOVEMBER 28TH, 1907.

FULL COURT.

BAGSHAWE v. ROWLAND.

Principal and Agent—Agent's Commission on Sale of Land—Employment of Agent by Vendor to Find Purchaser—Contract—Acceptance of Purchaser Found—Sale not Completed Owing to Fault of Vendor—Right to Payment for Services.

Appeal by defendant from judgment of IRVING. J., in favour of plaintiff in an action for commission on the sale of land.

The appeal was heard by HUNTER, C.J., MORRISON, and CLEMENT, JJ.

A. E. McPhillips, K.C., for defendant. Not only is there a conflict of testimony as to area, but we charge absolute misconduct on the part of the plaintiff, and we therefore submit he is not entitled to recover. There was no bargain to sell. Plaintiff was a mere volunteer. Then the purchasers came and added terms, to which defendant's consent was necessary. It was incumbent on plaintiff to shew that the persons he introduced were competent to carry out the sale, and in this respect he did not discharge his duty as agent.

W. J. Taylor, K.C., for plaintiff. The plaintiff has produced purchasers willing and able to purchase on the precise terms of the vendor. There is a definite, precise contract for $25 per acre. [HUNTER, C.J.:—There is the bare agreement that if you get a purchaser there is $25 an acre in the deal for you. The question then is: Did he produce a purchaser, able and willing to purchase on those terms?] Plaintiff did every act necessary to bring the parties together; he did bring them together, and t' e purchasers were ready, willing, and competent to carry out the sale. Having gone so far, he earned his commission.

The judgment of the Court was delivered by

CLEMENT, J.:—As intimated by the learned Chief Justice during the argument. it is, in my opinion, a misnomer to call the contractual relationship between the plaintiff and defendant a relationship of agent to principal. It is more correct to say that the plaintiff was employed by the defendant to perform certain services for reward; he was not appointed an agent to sell, but was employed to find a purchaser on certain named terms. The learned trial Judge has found as fact (a) that the plaintiff did find purchasers ready, willing, and able to buy on those terms, and a careful perusal of the evidence has failed to raise in my mind any serious doubt as to the correctness of this finding.

He has also found these further facts: (b) that the defendant accepted those purchasers; (c) that the terms, including some additional terms, insisted on by the defendant, were agreed to; (d) that the sale went off through the sole fault of the defendant: findings, in my opinion, sufficiently justified by the evidence. The case, therefore, is exactly within the language of Lord Esher, M.R., in Grogan v. Smith, 7 Times L. R. 132. We are thus relieved from con-

sidering whether the initial finding of fact (a) would, if it stood alone, entitle the plaintiff to recover, a question upon which there has been apparently some difference of opinion: see Galloway v. Stobart, 35 S. C. R. 301; Mackenzie v. Champion, 12 S. C. R. 649.

No point was made before us that by the judgment under review the plaintiff will receive his reward in full at once rather than in instalments, as would have been the case had the deal not been called off by the defendant.

I cannot see any misconduct on plaintiff's part to disentitle him to recover. I think the learned trial Judge correctly disposed of this branch of the case.

I would dismiss the appeal with costs.

BRITISH COLUMBIA.

NOVEMBER 28TH, 1907.

FULL COURT.

BOLE v. ROE.

Appeal—Water Clauses Consolidation Act, 1897, secs. 36, 39 —"Decision"— Time for Taking Appeal — Interlocutory Appeal—Jurisdiction.

In a proceeding under the Water Clauses Consolidation Act, 1897, before a County Court Judge, on appeal from Water Commissioners, the respondents objected, inter alia, to the jurisdiction of the County Court Judge, who overruled the objection and proceeded with the hearing, reserving his decision on the petition generally. The respondents appealed from the decision as to jurisdiction within the 21 days given in sec. 39 as the time within which an appeal must be taken from the decision of any Supreme or County Court Judge in any proceeding under the Act.

The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

Harris, K.C., for the appellants (respondents to the petition before the Court below.)

J. Martin, K.C., for the respondents, objected that no ground of appeal to the full Court existed at the present stage of the hearing. The appeal book disclosed that no de-

cision had yet been given by the County Court Judge: see sec. 36 (a) of the Act. There is only one appeal provided for, and that is from the final adjudication of the case by the Judge.

Harris. Our objection to the Judge's jurisdiction below went to the root of the whole matter, and in order to save ourselves we had to appeal within the 21 days allowed by sec. 39. He cited Belcher v. McDonald, 9 B. C. R. 377, and Laing v. Victoria, 6 B. C. R. 117.

IRVING, J.:—I think the objection of Mr. Martin is well taken. The case of Belcher v. McDonald was one where there were separate causes of action, and cannot have any application to this case where only interlocutory rulings are objected to.

The word "decision" in sec. 39 means the final disposition of the whole case, and an appeal has to be taken within 21 days from such final disposition. I think reason and convenience require that we should read in the section for "decision," "final disposition," and this is borne out by the language that the appeal from that decision shall be the ordinary appeal from a final judgment.

MARTIN, J.:—I think, reading secs. 38 and 39, that the statute contemplates one decision.

CLEMENT, J.:—I also agree.

Appeal dismissed.

BRITISH COLUMBIA.

CLEMENT, J. NOVEMBER 29TH, 1907.

TRIAL.

STEVENSON v. SMITH.

Principal and Agent—Authority of Agent—Delegation—Receipt Given in Name of Agent's Firm, Signed by Clerk—Statute of Frauds—Vendor and Purchaser—Contract for Sale of Land—Specific Performance.

Action for specific performance of an agreement in writing dated 4th April, 1905, wherein, as the plaintiff alleged,

the defendant, through his agents, Rand Brothers, agreed to sell the defendant lot 3, block 27, D. L. 192, city of Vancouver, for $1,500, payable as therein provided. The defendant, who was the owner of this property, listed it for sale with E. E. Rand, member of a firm of Rand Brothers, with whom he was personally acquainted, for the purpose of selling, the authority being in writing as follows: "Until further notice you may sell for me, subject to the terms of the contract under which I hold, and on my account, lots 1, 3, and 4-31192 and lot 3-32-192, at the price of $1,750 per lot, terms ¼ cash, balance 1 and 2 years at 7 per cent.; also lot 2-27-192 at $1,350, and lot 3-27-192 at $1,500, terms ¼ cash, balance 6, 12, and 18 months, at 7 per cent.; also lots 3 to 14, inclusive, block 4, D. L. 302, for $8,500, terms $3,000 cash, balance 6, 12, and 18 months, 7 per cent. interest. On whatever business you do in regard to the above I will allow you 5 per cent. commission up to $5,000, and 2½ per cent. for amount over."

On 4th April, 1905, Rand Brothers, by their clerk, purported to sell to the plaintiff the property in question, receiving from him on account $100, and giving him a receipt as follows:

"$100.00. "Rand Bros.
"Real Estate and Insurance Agents.
"Vancouver, B.C., April 4th, 1905.

"Received from A. E. Stevenson the sum of one hundred dollars ($100.00) for deposit on lot 3, block 27, D. L. 192, at $1,500.00 terms ¼ cash, bal. 6, 12, 18 mo. at 7 per cent.

"Rand Bros.,
"F."

On 10th April, and before he had received advice of the sale, the defendant notified his agent, E. E. Rand, by wire, to withdraw this property from the market.

The defendant set up that he had appointed E. E. Rand as his agent for the purpose of selling, and not Rand Bros., and relied on the Statute of Frauds.

Martin, K.C., for the plaintiff.

Wilson, K.C., for the defendant.

CLEMENT, J.:—In the absence, as here, of any evidence from which it might be legitimately inferred that the clerk

in the agent's office, who signed the receipt, was in fact himself the owner's agent. the signature of such a clerk is not that of an agent "thereunto lawfully authorized." To express it otherwise, an agent "thereunto lawfully authorised" within the Statute of Frauds cannot delegate his authority.

Nor can an agent who, at the time of the making of the alleged contract, has failed to bind his principal by a written note or memorandum, within the statute, sign an effectual note or memorandum after his authority as agent to sell has been withdrawn.

I express no opinion as to the sufficiency otherwise of the receipt in question.

Action dismissed with costs.

SASKATCHEWAN.

NOVEMBER 9TH, 1907.

FULL COURT.

ANTICKNAP v. CITY OF REGINA.

Judgment by Default — Order Setting aside — Merits—Discretion—Appeal—Delay.

Appeal by plaintiffs from order of NEWLANDS, J., in Chambers, setting aside a default judgment entered by plaintiffs.

Rimmer, for plaintiffs.

F. W. G. Haultain, K.C., for defendants.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, J., LAMONT, J.), was delivered by

WETMORE, C.J.:—No reasons are stated in the judgment of the learned Judge. As one of the affidavits used on the application discloses merits, we assume that the defendants were let in to defend on the merits. The affidavit of merits is not as full as it might be. Nevertheless, we think that there is sufficient established to warrant the learned Judge in

coming to the conclusion that the defendants have a defence which they should properly be allowed to set up. This was a matter in the discretion of the learned Judge, and we do not feel disposed to interfere with that discretion. The plaintiffs' statement of claim, on the other hand, is open to be charged with the omission of material averments. There seems to have been very great delay in this case. The action was brought in 1905, and, although interlocutory applications were made, apparently the case was allowed to drag along until January, 1907, when judgment was signed; and then after that there appear to have been interviews with the object of arriving at a settlement. Taking all these matters into consideration, we are of opinion that the decision of the learned Judge should not be interfered with, and this appeal will be dismissed with costs.

ALBERTA.

SCOTT, J. NOVEMBER 19TH, 1907.

TRIAL.

BRAATZ v. WHITE WHALE LAKE SCHOOL DISTRICT No. 746.

Assessment and Taxes—School Taxes—Assessment Made before Commencement of Year — Invalidity — Change of Ownership—Taxes Paid under Protest — Recovery—Interest.

Action for the return of $80 and for interest thereon, in the circumstances stated in the judgment.

O. M. Biggar, for plaintiff.

J. E. Wallbridge, for defendants.

SCOTT, J.:—The statement of claim alleges that defendant Hoffman, claiming to act under the authority of the school district, on or about 15th July, 1905, wrongfully seized plaintiff's threshing machine for taxes alleged to be due the district for 1905, in respect of section 11, township 52, range 3, west of 5th meridian, and the south-east quarter

of section 3 in the same township; that during the same month Hoffman threatened to sell the threshing machine for $80, the amount of arrears of such taxes, when plaintiff under protest paid that amount to him, reserving the right to recover the same; that the lands were not the property of or in possession of the plaintiff during that year, and were not assessed by the district to the plaintiff in that year; and that he was not liable for any taxes in respect thereof at the time of such seizure. Waiving the tort, he sues for the return of the $80 and interest.

Upon the argument it was admitted by counsel for the defendants that during 1905 no assessment was made for the school district, nor any rate struck. It appears, however, that at a meeting of the trustees held on 19th December, 1904, they assumed to make an assessment for 1905, and to strike a rate thereon. It was upon that assessment and rate that the taxes in respect of which the seizure was made are claimed by the defendants.

I am of opinion that such assessment is invalid. Section 6 of the School Assessment Ordinance provides that, as soon as may be in each year, the assessor of the district shall assess every person the owner or occupant of land in the district, and shall prepare an assessment roll. I can find nothing which would authorize the board of trustees to make or direct to be made an assessment before the beginning of the year in respect of which it is made. One objection to such a course is that the persons liable to assessment are those, and those only, who are owners or occupants of land at the time of the making of the assessment; and, if it were made before the beginning of the year, the result may be, and would be in this case, that a person would be liable to assessment in respect of land of which he was neither the owner nor occupant during any portion of the year for which the assessment was made.

As the evidence shews that the $80 claimed was paid by the plaintiff under protest, I give judgment in his favour for $89 and costs.

ALBERTA.

BECK, J. NOVEMBER 20TH, 1907.

TRIAL.

GREAT WEST LUMBER CO. v. WILKINS.

Vendor and Purchaser — Contract for Sale of Land—Price Payable by Instalments—Interest—Construction of Contract—Default—Notice of Cancellation—Waiver—Tender —Demand of Payment—Place of Mailing—Mistake in Date of Contract—Time of Essence of Contract—Forfeiture—Relief against—Judicature Act.

Action to compel specific performance by defendant Wilkins of a contract for the sale of land to plaintiffs, and to set aside a transfer of the land by defendant Wilkins to defendant Grant, and for other relief.

W. L. Walsh, K.C., and W. Payne, for plaintiffs.

Crawford, for defendant Wilkins.

James Muir, K.C., for defendant Grant.

BECK, J.:—The defendant Wilkins and the plaintiff company entered into an agreement bearing date 12th March, 1906, whereby Wilkins agreed to sell and the company to purchase the land in question in the action.

The price was $1,750, payable $600 down, which was paid at the time; $575 on 12th March, 1907; and $575 on 12th March, 1908. It was apparently assumed at the trial, as the point was not raised, that the terms of the agreement with regard to interest made the interest payable with each instalment upon the whole balance of principal then owing, and not merely upon the instalment then payable.

The words of the agreement are:—"Shall . . . pay . . to the party of the first part . . the said sum (sic) of money above mentioned, together with interest thereon, at the rate of 8 per centum per annum on the days and times in manner above mentioned." There is nothing to which the word "sum" can with entire accuracy refer. It cannot refer to the total purchase price of $1,750, as it is impossible that interest should run upon the whole of that sum. The sum of the two deferred payments of $575 each, namely,

$1,150, is no where expressed. Therefore I hold that the words "the said sum" in the clause under consideration mean "each of the said sums of $575," and therefore that the amount owing by the plaintiffs on 12th March, 1907, was the instalment of principal, $575, together with interest on that sum only at 8 per cent. per annum for one year.

I so construe the agreement independently of the fact, which was proved, that it was Wilkins himself who drew the agreement, and that, for that reason, in case of ambiguity, the agreement should be construed in the sense most favourable to the other party.

The agreement contains the following clause: "And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned and as often as such default shall happen the said party of the first part . . . may give to the party of the second part . . . 30 days' notice in writing demanding payment thereof, and, in case such default shall continue, these presents shall at the expiration of such notice be null and void and of no effect, and the said party of the first part shall be at liberty to resell and convey the said lands to any purchaser thereof, and all the money paid hereon shall be absolutely forfeited to the party of the first part. The notice shall be well and sufficiently given if delivered at the chief place of business of the party of the second part . . . or mailed at Red Deer post office under registered cover addressed as follows: The Great West Lumber Company, Ltd., Red Deer, Alberta"

On 16th April, 1907, Wilkins mailed not "at Red Deer post office," but at the Lacombe post office, distant from Red Deer about 20 miles, a notice under registered cover addressed to the company, which was delivered on 17th April from the Red Deer post office to a clerk employed in the company's office, who was in the habit of receiving the company's mail, though it did not come to the notice of any officer of the company until 23rd April.

The enclosed notice read as follows:

"Lacombe, Alta, 16th April, 1907.

"The Great West Lumber Co., Ltd.,

"Red Deer, Alta.

"Gentlemen:—Take notice that unless the instalment of $575 now due upon the agreement for the purchase of part of

the south-east quarter of section 18, township 38, range 37, west of the 4th meridian, dated March 14th (sic), 1906, together with all interest accrued upon the unpaid balance of principal purchase price under the terms of the said agreement, is paid to me on or before the 20th day of May, 1907, I shall, according to the provisions of said agreement, declare the same cancelled.

"Yours truly,
"Francis E. Wilkins."

This notice was handed by the president of the company, who was leaving town, to Mr. Greene, the secretary of the company, on Saturday afternoon the 18th May, with instructions to make payment of the amount claimed to Wilkins. Wilkins was then living in Lacombe. On Monday 20th May, about 1 p.m., Greene telephoned to Lacombe with the view of getting into communication with Wilkins, but failed. The same afternoon, however, owing to Greene's telephone message, Wilkins came to Red Deer, and about 10 p.m. telephoned to Greene at his house. The question of the payment was the subject of the conversation. Wilkins said he would not accept bank notes or a marked cheque. In reply to a question from Greene, Greene understood (so I find) that Wilkins would accept the amount of the instalment and interest as claimed by the notice up to 12 o'clock noon of the next day, the 21st May. On the other hand, I find that Wilkins intended 12 o'clock midnight of the day on which he was speaking, namely, 20th May, the day fixed by the notice for payment.

I suppose that, the burden of shewing a waiver being on the plaintiffs, it is necessary that they should shew an intention, or at least statements or conduct indicating an intention, on the part of Wilkins to waive, and that the facts as I have found them shew that they have failed to shew a waiver.

On the morning of 21st May, Wilkins and the husband of the defendant Grant, between whom on a previous occasion there had been conversation of a general character with the same object in view, met in rooms occupied by Wilkins's brother in Red Deer, and it was there and then agreed verbally that Wilkins should sell the property in question to the defendant Grant. They agreed upon the price; but the evidence fails to satisfy me that an agreement was then arrived at complete and definite in all its necessary terms.

Wilkins's evidence on this point at the trial, though I do not doubt his honesty, was given in a very hesitating, broken, and doubting manner; his statements made upon his examination for discovery and put in on the trial would convey the impression that all the necessary terms of an agreement had not then been settled; Grant, the husband of the defendant, although in Court throughout the trial, was not called; and it is admitted that the documents actually executed, as they were that night at Lacombe, expressed terms differing from those which it is alleged were agreed to in Wilkins's brother's rooms in Red Deer. Leaving these rooms, Wilkins and Grant went to a solicitor's office for the purpose of having the documents drawn. While they were in the solicitor's office a tender of the amount claimed was made to Wilkins on the plaintiffs' behalf, and was refused. Grant knew beforehand of the agreement between Wilkins and the plaintiffs, and that if he took title from Wilkins it would depend upon the validity of Wilkins's proceedings to cancel the agreement, and he either actually heard the tender made or was instantly informed of it. I hold that Grant throughout acted as the alter ego of his wife; that is, that she is bound by his acts to the fullest extent that she would be bound if acting in her own person.

I find as a fact that the defendants have failed to shew that prior to the tender above mentioned, an agreement even verbal, complete in all its terms, for the sale of the property by Wilkins to the defendant Grant, had been reached.

Mr. Walsh, on the plaintiffs' behalf, contended that Wilkins's attempt to cancel the agreement was ineffective, on the following grounds:—

(1) The clause in the agreement calls for a demand of payment, and the notice is not a demand.

(2) The notice refers to an agreement dated 14th March, while the agreement in question bears date 12th March.

(3) The clause provides, in case of the notice being mailed, that it should be mailed at "Red Deer," and the notice in question was in fact mailed at Lacombe.

(4) There was no default at the time the notice was given, in view of the terms of payment expressed in the agreement, the proviso giving the purchaser the privilege, he contended, of not paying before the date fixed for the payment of the last deferred payment.

(5) The clause under which it was attempted to cancel the agreement is penal, and the Court can and ought to relieve against it.

On the authority of Johnson v. Lyttle's Iron Agency, 5 Ch. D. 687, and Jackson v. Northampton Street Tramways Co., 55 L. T. 91, following it, I hold that the notice given by Wilkins, the vendor, was invalid on the two first grounds stated.

The notice contemplated by the contract is, in my opinion, an express, that is, a direct, demand; if the clause in question is valid, such a demand, followed by default in compliance within 30 days, would ipso facto work a forfeiture; the notice, though it may constitute an implied demand, besides not being, as I think the clause intends, an express demand, is not framed in view of the intent of the clause that forfeiture shall follow ipso facto, but contains a notice that a subsequent positive act will be done by the vendor. For these reasons, I am of the opinion that the notice is not such a notice as the clause contemplated.

I think, too, that the inaccuracy in the reference to the date of the agreement is sufficient to invalidate the notice.

Furthermore, I hold that the notice was invalid on the ground that it demanded payment of more than what was payable, namely, interest on the whole balance of principal, instead of merely interest on the instalment.

The cases cited above establish that, in order that a notice should be made the basis of a forfeiture, it is necessary that every condition required by the statute or contract, as the case may be, should be strictly complied with.

The fact that the notice, although mailed not "at Red Deer," but at Lacombe, reached Red Deer and was delivered from the Red Deer post office at a date which left more than 30 days between that date and the date fixed by the notice, would probably constitute a fulfilment, even for the purposes of a forfeiture, of the requirements of the clause as to the mailing of the notice.

As to the clause relating to payment on which it is argued that there was no default at the time of the giving of the notice, I cannot construe it in the sense contended for. The statement of the terms of payment is followed by the following proviso: "Always provided, however, that the said party of the second part may at any time within the above mentioned period pay the balance due and the

interest thereon to the date thereof." This clearly merely gives the purchaser the right to prepay.

I now proceed to a consideration of the last ground taken by counsel for the plaintiffs.

In Wallis v. Smith, 21 Ch. D. 243, Jessel, M.R., reviews the authorities upon the construction of contracts, from the point of view of the question whether or not provisions are to be treated as penal, and lays it down that these authorities may be classified as follows:—

(1) Where a sum of money is stated to be payable either by way of liquidated damages, or by way of a penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as a penalty, and you can only recover that actual damage, and the Court will not sever the stipulations. If any one of the stipulations is for the payment of a sum of money of less amount, then the proviso is bad (p. 286).

(2) A class of cases in which the amount of the damages is not ascertainable per se, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will in all human probability be small—that is, where it is not absolutely necessary that they should be small, but it is so near to a necessity, having regard to the probabilities of the case, that the Court will presume it to be so (p. 257). As to this class the learned Judge says: "I do not think it necessary to express a final opinion in this case" (p. 258).

(3) The class of cases . . in which the damages for the breach of each stipulation are unascertainable or not readily ascertainable, but the stipulations may be of greater or less importance or they may be of equal importance (p. 258). The learned Judge seems to refrain from expressing a final opinion upon this class of case also.

(4) A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all these cases the Judges have held that this rule (that applied in the first class of cases) does not apply, and that the bargain of the parties must be carried out (p. 258).

In Howe v. Smith, 27 Ch. D. 89, it was held that a deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the perform-

ance of the contract, and that the purchaser, having failed to perform the contract within a reasonable time, had no right to a return of the deposit.

In Cornwall v. Henson, [1900] 2 Ch. 298, Webster, M.R., says: "I feel very great doubt whether the doctrine of Howe v. Smith would apply to a case in which the purchase money was to be paid by instalments;" and Collins, L.J., says: "If the contract had contained an express stipulation that on non-payment of any instalment the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty and would have relieved him from it, as was done in In re Dagenham (Thames) Dock Co., L. R. 8 Ch. 1022.

Even apart from the legislation presently to be referred to, by virtue of which this Court has power to relieve against penalties and forfeitures in all cases, I should be prepared to hold, as I now do—and that unhesitatingly—that the rule laid down in Howe v. Smith applies only to cases of deposit, that is, that it does not apply to cases of default in payment of instalments of purchase money, and that such cases come within the first class of cases listed by Jessel, M.R., that is to say, that a clause such as that in question in the present case will be construed as creating a penal forfeiture, against which the Court of Chancery would have relieved.

In In re Dagenham (Thames) Dock Co., supra, the facts were substantially as follows. The company agreed with land owners to purchase a piece of land for £4,000, of which £2,000 was to be and was paid at once, and (taking the terms of an extension agreement) the remaining £2,000, on a future fixed day. It was agreed that, if the undertaking (of building a dock) should be abandoned, or in case the £2,000, with all interest from the date of the original agreement to the day of payment, should not be entirely paid off and discharged by the date fixed for payment, in all which respects time was to be of the essence of the contract, it should be lawful for the vendors, notwithstanding that the conveyance might have been executed, and notwithstanding any intermediate negotiations or correspondence, to any intermediate negotiations or correspondence, to enter into and upon and take possession of the lands and all works thereon, and the same to have again, retain, re-possess,

and enjoy as of their former estate, and to eject the company therefrom, without any obligation on the part of the vendors to repay to the company the £2,000 already paid or any part of the balance which might have been previously paid or any interest thereon which should be absolutely forfeited; and it was again expressed that in all respects and in every case time should be of the essence of the contract. Default was made in the payment of the money. In an action of ejectment by the vendors, the Master of the Rolls declined to make any other order than an order for sale and payment, as in the ordinary case of vendor's lien. On appeal, James and Mellish, LJJ., affirmed the decision of the Master of the Rolls. Mellish, L.J., says: "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." I fancy the agreement impliedly gave the purchaser the right to make partial payments prior to the date fixed for payment of the £2,000; even so, the purchaser not having contracted to pay by instalments, the case appears to me a stronger one in favour of the purchaser than the present case.

There may, however, be one important difference between the case just cited and the present case. In the case just cited the purport of the contract was to enable the vendors themselves to hold the property freed from all liability to the purchaser. In the present case, the proper interpretation of the clause in question may be only to give a right of resale, leaving the purchaser the right to reinstate himself up to the consummation of a sale; but, even in that event, the clause purports to forfeit all moneys previously paid on account.

Inasmuch as I have held that no contract, even verbal, for a sale had been concluded, the point is not important in the present case; but, if it were necessary, I should be prepared to hold, at all events in view of the provision for forfeiture of all previous payments on account, that the principles of interpretation in either case are the same.

The Statute Law Amendment Act (statutes of Alberta, 1907, ch. 5, sec. 7 (8)) provides that, "subject to appeal as in other cases, the Court shall have power to relieve against

all penalties and forfeitures, and on granting such relief, to impose such terms as to costs, expenses, damages, compensation, and all other matters, as the Court sees fit." This is in the words of the Ontario Judicature Act, sec. 57, sub-sec. 3.

I do not find that there is any corresponding provision in the English Judicature Act. The English statutory provisions are noted in Snell's Equity, 13th ed., pp. 367 et seq. The mere use of the term "penalty" or "liquidated damages" is not conclusive, and in case of ambiguity the Court will lean in favour of the construction which treats the same as a penalty, in order that the Court may relieve against it: Snell, p. 367.

Similarly I cannot see that the embodiment in the clause of the provision that time shall be the essence of the agreement can prevent the construction of the clause as penal; indeed, it seems to me to intensify its penal character.

I hold, therefore, as I have already intimated, that the clause is penal; that is, that it purports to create a forfeiture, against which, prior to the fusion of the courts of law and equity, a court of equity would relieve. In my opinion, this being so, this right of equitable relief is one of the "equitable rights" which any one of the fused courts is bound to recognize and give effect to, in the same way and to the same extent as any ordinary legal defence, by reason of the provision of the English Judicature Act, 1873, sec. 24: "(4) The said Courts respectively, and every Judge thereof, shall recognize and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act." This is in substance re-enacted in our own Judicature Ordinance, as sec. 8, sub-sec. 4.

In my opinion, the effect of this provision is that once it is determined that the clause is penal it is in effect determined that the clause is merely "in terrorem" (see Clyde Engineering and Shipbuilding Co. v. Castaneda, 91 L. T. 666), and "bad" (see per Jessel, M.R., in Wallis v. Smith, supra, p. 256), and (in the case of companies)

ultra vires (see per James, L.J., in In re Dagenham (Thames) Dock Co., supra.)

It must not be supposed that, if the view I take of the law is correct, a vendor has no remedy against a defaulting purchaser other than a proceeding in court corresponding to proceedings by a mortgagee for foreclosure or sale, a right which he undoubtedly has (see Hudson's Bay Co. v. Macdonald, 4 Man. L. R. 237, 480). If the purchaser has not merely delayed but abandoned or repudiated the contract, all his rights under it are gone, and the vendor may deal with the property and payments on account as if the contract had never been made; if, though he has not abandoned or repudiated, the purchaser has nevertheless delayed an unreasonable length of time in fulfilling its terms, his right to specific performance has gone, leaving the property to the vendor subject to pay by way of damages probably any net surplus of profit on a resale. This is what I conclude from such cases as Cornwall v. Henson, [1900] 2 Ch. 298, and Stringer v. Oliver, 6 W. L. R. 519, recently decided by my brother Stuart. See the question discussed and cases and other text-writers referred to in Williams on Vendor and Purchaser, p. 954 et seq.; 42-45; 931.

In holding, as I do, that the clause in question is ineffective, I follow and I do not think I go beyond the decision of the Lords Justices affirming the decision of the Master of the Rolls in In re Dagenham, supra.

I gather from Pomeroy's Equity Jurisprudence (Equitable Remedies), vol. 2 (1905), p. 816, that the conclusion I have come to is in substantial accord with the decisions of a great majority of the American Courts. It is there said: "Contracts often contain a clause that if payment is not made at the day, the defaulting vendee shall forfeit all payments previously made and lose his right to the land. The courts of equity in England, and most American jurisdictions, deal with such a forfeiture clause on the principle that equity abhors a forfeiture and will relieve from it. It will, if possible, consider the clause as a stipulation for security of performance and not as intending a great loss to one party by a slight failure to perform, and will decree a performance against the vendor, with compensation for delay by interest on the purchase money, thus relieving against the forfeiture. Equity in relieving against a forfeiture in a contract of sale, and thus declining to acknowl-

edge the express terms of a contract, points to the analogy of the mortgage. Here, it says, equity refuses to carry out the contract with forfeiture for breach in performance. It does not regard the forfeiture clause as of the substance of the contract. Neither will it in a contract for the sale of land. It assumes that the real intention of the parties was to create a security and not a forfeiture, and equity relieves against any forfeiture or penalty inserted for the purpose of enforcing the contract."

I have already held that the forfeiture clause in question is merely "in terrorem," "bad," and ineffective. I do so because, as I have said, it attempts to give occasion to a forfeiture against which, when courts of law and courts of equity exercised distinct jurisdictions, a court of equity would relieve. Now that the same rules as to the rights of parties are applied in all courts—and those the rules of equity where there was a difference—I am of the opinion that what formerly constituted an equitable right which might be enforced by a positive proceeding (e.g., a bill in Chancery, an equitable plea, a counterclaim), has become a question of the legal (in the sense of the application of the equitable rule) construction of the contract.

This is surely the history and ultimate result in the case of mortgages.

"The absolute forfeiture of the estate at common law, in breach of the condition, was, in the eye of equity, an injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The court of equity, founded on the principles of the civil law, gradually succeeded, by an introduction of those principles, in moderating the severity with which the common law followed the breach of the condition. Though they could not alter the legal effect of the forfeiture at common law, they operated on the conscience of the mortgagee, and, acting in personam, they declared it unreasonable that he should retain for his own benefit what was intended as a mere security; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law: Coote on Mortgages, 7th ed., pp. 11-12. In the result, the combined effect of the equitable doctrine applied to the (former) legal interpre-

tation of a mortgage, the abrogation of the rule of equity for the rule of law where they differed, and the fusion of the courts, result, in my opinion, in a different legal construction of a mortgage; the words which formerly created a forfeiture do not create a forfeiture; the provisions in that behalf are, to that extent, void. So it is, it seems to me, with respect to all agreements purporting to create forfeitures, against which the Court of Chancery under the former practice would have relieved. They must now, it seems to me, be held to be void.

I have put this as a general proposition, but it is not necessary for me to go to that extent in the present case, because there is the express provision of the Judicature Act, which declares that "stipulations in contracts as to time, or otherwise . . shall receive the same construction and effect as they would have heretofore received in equity." In equity the stipulation in question was ineffectual, that is, in my opinion, void.

It remains for me merely to notice some of the cases to which I was referred, and with which it may be supposed that my conclusions are in conflict.

Peirson v. Canada Permanent and Western Canada Mortgage Corporation, 11 B. C. R. 139, 1 W. L. R. 99, is a case of forfeiture of the deposit only, and the decision might properly have been given independently of a forfeiture clause.

Forfar v. Sage, Ex p. Wilkins, 5 Terr. L. R. 255, with due deference to the learned Judge who decided it, I cannot follow. The most that I think the vendor was entitled to, even if to that, was an order on the lines of the decision of my brother Stuart in the case already referred to of Stringer v. Oliver. Steele v. McCarthy, 6 W. L. R. 396, with due deference to Newlands, J., I cannot follow.

The judgment will be that the transfer from the defendant Wilkins to the defendant Grant and the certificate issued thereon and the mortgage on the land from the defendant Grant to the defendant Wilkins be respectively cancelled; that the plaintiffs recover their costs against both defendants; that the plaintiffs pay into Court $575, with interest thereon at 8 per cent. per annum from 12th March, 1906, to the date of payment, within one month from this date; and that the question of the payment out of Court

of the moneys, in case they are paid in, and all questions arising between the defendants and all questions arising in the event of the plaintiffs making default in payment, be reserved for further consideration.

ALBERTA.

BECK, J. NOVEMBER 20TH, 1907.

SINGLE COURT.

DEERING v. GIBBON.

Bankruptcy and Insolvency—Distribution of Insolvent's Estate—Lien of Execution Creditors—Alberta Assignments Act, 1907, sec. 8—Retroactivity—Preference—Executions Delivered to Sheriff—Costs.

Special case stated by consent for the opinion of the Court in an action brought by William Deering & Co. against W. H. Gibbon, assignee of the estate of Frank A. Perkinson, insolvent, pursuant to Order XXIV., Rule 250, of the Judicature Ordinance:—

1. It is admitted that on 22nd August, 1906, the plaintiffs recovered judgment in the Supreme Court of the North West Territories, Northern Alberta Judicial District, against the insolvent for $569.90, consisting of $539 debt and $39.90 taxed costs.

2. It is admitted that on 29th September, 1906, the plaintiffs issued execution against the goods and lands of the insolvent for $569.90, directed to the sheriff of the Northern Alberta Judicial District, in whose bailiwick the goods and lands of the insolvent were then situate.

3. It is admitted that the plaintiffs' execution against the above named insolvent was delivered on 1st October, 1906, to the sheriff of the Northern Alberta Judicial District to be executed.

4. It is admitted that the sheriff made an actual seizure of the goods of the insolvent on 3rd June, 1907, and that the goods so seized had been owned by the insolvent prior to the date of the plaintiffs' judgment.

5. It is admitted that the insolvent on 5th June, 1907, made an assignment for the benefit of his creditors, pursuant to ch. 6 of the statutes of Alberta for 1907, to one A. R. Dickson of Wetaskiwin, Official Assignee.

6. It is admitted that at a meeting of the creditors held in the town of Stettler, in the province of Alberta, on 22nd June, 1907, the defendant was by the said creditors appointed the assignee in the place and stead of A. R. Dickson.

7. It is admitted that at a meeting of the creditors held in the town of Stettler on 22nd June, 1907, the plaintiffs claimed priority by virtue of their execution and directions to the sheriff, and the subsequent proceedings taken thereunder.

8. It is admitted that after the meeting of the creditors referred to in paragraph 7, the assignee took possession of the goods levied on, and sold the same, having full knowledge of the plaintiffs' claim.

9. It is admitted that the assignee holds the proceeds of such sale pending the decision of this case.

10. It is admitted that there are other executions delivered to the sheriff of the Northern Alberta Judicial District, under like circumstances and in the same position as the plaintiffs' execution.

The questions for the opinion of the Court are: Firstly, are the plaintiffs, and other execution creditors in like position, by virtue of their executions and the delivery of the same to the sheriff to be executed, and subsequent proceedings thereon, or either of them, entitled to a preference for the amount of their judgment in addition to their lien for costs, if any?

Secondly, does sec. 8 of the Assignments Act, being ch. 6 of the statutes of the province of Alberta, 1907, govern the plaintiffs' execution and those of other execution creditors in like position?

Thirdly, if the plaintiffs and other execution creditors in like position are entitled to a lien for their costs, and are to share ratably with the unsecured creditors for the balance of their judgment, to what costs does their lien apply?

W. E. Payne, Red Deer, for the plaintiffs.

J. T. Harding, Stettler, for the defendant.

BECK, J.:—The whole point involved is the question whether sec. 8 of the Assignments Act (statutes of Alberta, 1907, ch. 6) is retroactive, in the sense that it affects the rights of execution creditors whose executions were in the hands of the sheriff for execution prior to the Act coming into force, viz., 15th March, 1907, but had not been completely executed by payment. The section reads as follows: "An assignment for the general benefit of creditors under this Act shall take precedence of all attachments of debts by way of garnishment, where the money has not been actually paid over to the garnishing creditor, as well as of all other attachments, and of all judgments, and of all executions not completely executed by payment, subject to the lien, if any, of the execution or attaching creditors for their costs."

This section, so far as it relates to executions, is in the same words as the corresponding Ontario Act, R. S. O. 1897 ch. 147, sec. 11.

Rule 356 of the Judicature Ordinance (C. O. 1898 ch. 21) says: "Except as hereinafter mentioned, every writ of execution against goods and chattels shall, at and from the time of its delivery to the sheriff to be executed, bind all the goods and chattels of the judgment debtor within the judicial district of the said sheriff, and shall take priority to any chattel mortgage, bill of sale, or assignment for the benefit of all or any of the creditors of the judgment debtor executed by him after the receipt by the sheriff of such writ of execution, or which by virtue of the Bills of Sale Ordinance has not taken effect prior to such receipt as against the creditor's or creditors' interest under the execution . . ."

In my opinion, the delivery of an execution to the sheriff to be executed creates a lien upon the execution debtor's property, or, to adopt the word used in Woodland v. Fuller, 11 A. & E. at pp. 867-8, "a charge." The lien of an execution, like other liens, does not of itself transfer title. It does not change the right of property and vest it at once in the plaintiff in execution, nor in the officer charged with the execution of the writ. It confers, however, the right to levy on the property, to the exclusion of all transfers and liens made by the defendant subsequent to the commence-

ment of the execution lien (Freeman on Executions, 3rd ed., p. 195), subject to some statutory exceptions.

This is the character of the lien which I hold is created by the delivery of a writ of fi. fa. to a sheriff to be executed, by force of the word "bind" in the statutory provision already quoted, evidently based upon the Imperial Sale of Goods Act, 1893, sec. 26, itself a modification in form of the Imperial Mercantile Law Amendment Act, 19 & 20 Vict. ch. 97, sec. 1.

That an execution under such circumstances does create a "lien" is implied in the words of the latter portion of the section of the Assignments Act now under consideration, viz., "subject to the lien, if any, of the execution or attaching creditors for their costs," words clearly referring to the provision of the Creditors' Relief Ordinance (C. O. 1898 ch. 26), sec. 4, that "when the amount levied by the sheriff is not sufficient to pay the execution debts with costs in full, the moneys shall be applied to the payment ratably of such debts and costs after retaining the sheriff's fees and after payment in full of the taxed costs and costs of execution and extra costs of seizure and sale incurred by the creditor at whose instance and under whose execution the seizure and levy were made."

As to this lien for costs see Gillard v. Milligan, 28 O. R. 645

The English authorities as to the meaning of the word "bind" will be found collected and discussed in 11 Ruling Cases, pp. 549 et seq., 621 et seq., and Cababé on Attachment.

I do not pretend to have ascertained what effect should be given to them independently of the concurrent legislation on bankruptcy, by which it would seem that all these decisions are more or less affected. In the present case there was a seizure before the execution of the assignment, but after the passing of the Act. I cannot see that the fact of seizure creates in the execution creditor any higher right of lien or charge as against the assignment than the delivery to the sheriff, and for this reason I have considered the question of the effect of delivery only. It is true that,

by virtue of seizure, it is held that the sheriff acquires a special property in the goods seized—a special property of an exceptional character—but this does not, it seems to me, increase in any way the execution creditor's rights, so far as the question here involved is concerned.

The execution creditor in the present case having, as I held, a lien upon the property of the insolvent at the time of the assignment for the benefit of his creditors—is the effect of sec. 9 of the Assignments Act to destroy it? The well-established rule of construction of statutes is that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation (otherwise than as regards matter of procedure) unless that effect cannot be avoided without doing violence to the language of the enactment: Craies's Hardcastle on Statutes, 4th ed., pp. 322-3; Schmidt v. Ritz, 31 S. C. R. 602. On this principle I hold that sec. 8 does not affect the rights of execution creditors whose writs were in the hands of the sheriff for execution prior to the passage of the Act. I can find nothing, express or implied, in sec. 64 (it was contended that it impliedly shewed a contrary intent) inconsistent with this view.

I take it that what has taken place between the sheriff and the execution creditors on the one hand, and the assignee on the other, has not resulted in the lien of the execution creditors being lost, but that by arrangement the goods have been sold and the proceeds stand in their place subject to the Court's decision upon this stated case.

For the reasons given I answer the first question put in the stated case in the affirmative, and by implication this answers the two remaining questions.

As there is, I understand, a considerable amount involved in this case, and the decision, whether sustained or reversed, will have a far-reaching effect, I direct that the moneys in question shall not be distributed for one month from this date. If notice of appeal be given, I direct a further stay of distribution pending the decision in appeal. The costs of both parties I direct to be paid by the assignee out of the funds of the estate.

ALBERTA.

SCOTT, J. NOVEMBER 20TH, 1907.

TRIAL.

CRAWFORD v. PATTERSON.

Vendor and Purchaser—Contract for Sale of Land—Crop-payments — Default — Attempted Cancellation by Vendor —Assignment of Contract by Purchaser—Resale by Vendor —Rights of Assignee of Purchaser—Specific Performance —Delay—Damages—Costs—Defendants Severing—Lien.

Action for a declaration that a certain contract was still in force, for possession of land, and for other relief.

N. D. Beck, K.C., and C. F. Newell, for plaintiff.

J. C. F. Bown, K.C., for defendant Lavell.

J. R. Lavell, for defendant Patterson.

SCOTT, J.:—On 28th August, 1905, defendant Patterson entered into an agreement in writing to sell the lands in question to one John Crawford for $2,400, payable $200 in cash at the date of the agreement, and the balance with interest in yearly payments of one-half of all the grain crop grown on the land in each.

By the agreement the purchaser agreed to break sufficient land to put in not less than 35 acres of grain crops in 1906, and that he would, upon taking possession. build a suitable dwelling-house and stable, and that he would not sell or remove the crop then upon the land, but would keep the same for feed and seed the following year, or hold the same on the land till its buildings were completed and 35 acres put under cultivation. The agreement also contained a provision the effect of which, so far as material to the questions arising in this action, is that if the purchaser should fail to carry out in their entirety the conditions and stipulations of the agreement, the strict performance of each of them being a condition precedent and of the essence of the agreement, the vendor should have the right to declare the agreement null and void, by written notice to that effect personally served on the purchaser, his executors, administrators, or assigns, or mailed in a registered

letter addressed to him or them, whereupon all the rights and interests created by the agreement in favour of the purchaser and his assigns should cease and determine, without any right on the part of the purchaser or his assigns to any reclamation as compensation for moneys paid thereon, or the vendor, at his option, should have the right to resell the lands, either at public auction or at private sale, and in case the sum realized from such sale, after deducting the costs, charges, and expenses thereof, should be insufficient to pay the whole amount of principal and interest due under the agreement, the purchaser should pay the vendor the amount of such deficiency.

John Crawford, the purchaser, removed from the land and converted to his own use the whole of the crops of 1905. He did not erect any buildings upon the land, nor did he do any breaking in that year.

In the spring of 1906 defendant Patterson, by his agent, wrote to him, apparently notifying him of his intention to cancel the agreement for non-performance. They met about the latter end of March or beginning of April in that year and talked over the matter. Patterson complained that Crawford had broken the agreement by removing the grain crop and by not putting up the buildings, but he then told Crawford that if he would go on the land at once and fulfil the agreement, he would give him another chance. Crawford thereupon promised to do so, and to move to the land with his family the following week.

He did nothing, however, but on 17th April following he assigned his interest in the land to the plaintiff and one W. R. Bishop, since deceased, who at that time arranged with him that he should go on the land and do the necessary breaking, and also shortly afterwards arranged for the purchase of a quantity of lumber for the buildings on the premises; some breaking was done on the land that spring, but the evidence satisfies me that what breaking was done was not properly done, and that on 25th July following the quantity broken fell far short of that required to put in 35 acres of crop; that what crop was sown was not properly sown; and that none of the buildings specified in the agrement had been erected.

Some time before 25th July, plaintiff and defendant Patterson met, and the former offered $200 in cash and his note indorsed by Bishop by way of a security against loss

owing to the way the crops had been put in. Patterson refused this offer, but said that he would take $500 in cash. It does not appear that this last offer was accepted. It appears also that at that time Patterson told Crawford that the agreement would have to be lived up to or he (Patterson) would take the place from him.

About 25th July, 1906, defendant Patterson entered into an agreement with defendant Lavell to sell the lands to him for $2,650. The agreement bears that date, and the terms of sale were then agreed upon, but it was not executed by the parties until the following day, and on that day (26th July) defendant Patterson caused notices to be mailed to the plaintiff and to "Crawford and Bishop" declaring the agreement with John Crawford to be null and void for non-performance of the conditions and stipulations contained therein.

At the time of the execution of this agreement to purchase, defendant Lavell paid the down payment of $200 therein provided for, and immediately thereafter went into possession of the premises, and has ever since remained in possession thereof.

In this action plaintiff claims a declaration that the agreement of 28th August, 1906, is still in force and effect, an account of the crops of 1906, an order charging the defendants with half the net value thereof, possession of the land, an allowance for occupation rent, and damages and costs; and (alternatively) an account of the profits on the resale by defendant Patterson, and an order for the payment thereof by him.

During the trial Mr. Beck, K.C., public administrator, informed the Court that, since the commencement of the action, he had been appointed administrator of the estate of W. R. Bishop, and he applied to be added as a party defendant to the action, stating that he did not desire to be added as a party plaintiff. After hearing counsel for the other parties, I ordered that he should be added as a defendant.

The main question to be determined is whether defendant Patterson had the right under the provisions of the agreement of 28th August, 1905, to cancel that agreement, on the ground of non-performance by the purchaser or his assignees, and thereby deprive them of all rights thereunder. Following In re Dagenham (Thames) Dock Co., L. R.

8 Ch. 1022, and Cornwall v. Henson, [1900] 2 Ch. 1028, I hold that he did not possess that right, and that plaintiff and the administrator of W. R. Bishop are entitled to treat it as a subsisting agreement, at least for the purposes and to the extent hereinafter mentioned.

Shortly after defendant Lavell took possession of the premises under his agreement, plaintiff became aware that he had done so, yet he delayed for a period of nearly 4 months taking any proceedings to oust him from possession or to assert his (plaintiff's) rights under the first agreement. It also appears that he went to the premises in the month of August, and there saw defendant Lavell, and not only did he not then make any claim to the property, but he asked Lavell to haul into Strathcona for him some of his (plaintiff's) chattel property which had been left thereon. I think that the delay on his part, under the circumstances, was such as disentitles him to claim as against Lavell specific performance of the first agreement.

I think, however, that the plaintiff and defendant Beck, as administrator of Bishop, are jointly entitled to the alternative relief claimed by plaintiff, that is, damages against defendant Patterson. The question of the amount of damages to be awarded in case I found plaintiff entitled to any, was discussed at the trial. Plaintiff contended that the amount should be $650, while counsel for defendant Patterson urged that the amount should be only $450, viz., $200 which defendant Patterson received from the original purchaser, and $250, the proceeds of the resale in excess of the original purchase money. I hold that the latter is the correct money, and I therefore give judgment for plaintiff and defendant Beck against defendant Patterson for $450. Plaintiff to have the costs of the action against defendant Patterson.

As to the costs of defendant Lavell, both defendants appeared by the same solicitor, who conducted the proceedings throughout for both. They severed in their defences, however, and filed separate affidavits on production. All the other proceedings appear to have been taken jointly on behalf of both defendants, but they were represented by different counsel at the trial. If their interests were such that they could appear by the same solicitor, I see no reason why they should have had separate counsel at the trial. Such costs as defendant Lavell is entitled to must be paid

by the plaintiff. Plaintiff will therefore pay defendant Lavell the costs of any proceedings taken on his behalf alone, but not including any costs of the trial.

I hold also that plaintiff is entitled to a lien upon the proceeds of the judgment against defendant Patterson for one-half of the costs incurred by him in the action and of the costs directed to be paid by him to defendant Lavell.

STUART, J. NOVEMBER 23RD, 1907.

ALBERTA.

CHAMBERS.

RE BROTHERTON AND CITY OF MEDICINE HAT.

Assessment and Taxes—Special Frontage Assessment—Local Improvement—Half Lots Abutting on Street—Irregularity of Assessment—Constitution of Special Act Incorporating City.

Appeal by W. J. Brotherton from the decision of the Court of Revision of the City of Medicine Hat in respect of the special frontage assessment of lots 11 and 12 in block 17 in that city.

The appellant in person.

O. W. Kealy, for the city corporation.

STUART, J.:—The assessment was made under the provisions of title xxxiv. of ch. 63 of the statutes of 1906, being the special Act incorporating the city, and was for the purpose of defraying the expense of a cement sidewalk along one side of block 17. Lot 11 is a corner lot, and the appellant is the owner of the halves of lots 11 and 12 which immediately adjoin the sidewalk in question. These two lots had been divided so that the other half of each would abut on the side street, and the owner of the other half of each was originally assessed in respect of the improvement. But at the Court of Revision this was changed, and the latter halves were relieved from the assessment, and the whole burden was thrown on the halves of the

two lots in question which immediately adjoin the sidewalk, and of which the appellant is the owner.

The grounds taken by the appellant are: first, that the whole lots and not merely his half should have been assessed; second, which is merely the first ground in another form, that the whole of lot 12 should be considered as abutting on the sidewalk; and third, that, inasmuch as each of the half lots owned by the appellant is assessed for the same proportion of the total cost as is assessed against the remaining 8 lots in the block, which are whole lots and not divided, therefore the assessment is unfair and unjust and inequitable.

I am of opinion that the first two grounds cannot be sustained. There is no particular magic in the division according to lots, and since the lots in question, namely, Nos. 11 and 12, have been in fact divided into halves, and each half is in fact owned by different persons, I am of opinion that that half which does not touch the sidewalk in question must be considered as much a distinct parcel of land as if the division had been made in the original subdivision of the lots on the plan. The statute says: "The term 'special frontage assessment' shall be taken to mean a special assessment of the several lots abutting on the street or place whereon or wherein the improvement is to be made . ." Now, it is quite clear that that half of lots 11 and 12 which lies in the rear of the appellant's half does not in any sense of the word abut on the street on which the sidewalk was constructed; and, as it was assumed at the hearing that the assessment was in fact a special frontage assessment under sec. 1, sub-sec. 2, of title 34 of the Act, and not a "special local benefit assessment" under sub-sec. 3, it is quite clear, to my mind, that it would have been improper to assess the back half of the lots which abuts on the side street and not on the street where the sidewalk was made.

I think the third ground must also fail. The general rule is, as laid down in sub-sec. 2 of sec. 1, that the assessment is to be made according to the number of lineal feet measured along the front or other abutting portions of the said several lands, at a certain uniform and equal rate per foot. There is nothing in any of the sections which says that the assessment must be in proportion to the area of the several parcels. The general rule is that it must be according to the lineal feet frontage. It is true that there is a provision

in clause (a) of sub-sec. 2 which permits the assessor to take into account the question of difference in size or shape as well as the fact that a certain lot is a corner lot, and to consider certain lots as having on this account a smaller or larger number of lineal feet frontage than they actually have, and to assess them accordingly so that each parcel assessed may bear a fair and just and equitable proportion of the cost; but, in my opinion, this is a matter of discretion with the assessor, and, unless a case of gross unfairness or injustice is made out, I do not think I ought to interfere. There was no evidence adduced as to the purpose for which the lots along this block are occupied, and I can quite conceive circumstances in which it would not only not be unfair or unjust, but, on the contrary, eminently fair and proper, that the appellant should pay according to his lineal foot frontage, notwithstanding that his lots are not as deep as those of other owners opposite him. If the street were a business one, filled up with retail stores, the main value would be in the frontage available for business purposes, and in such case I think it would be quite proper to make no exception to the general rule laid down in sub-sec. 2. It is true the appellant's lots are not as deep as those belonging to the other owners; but I find it laid down in 25 Am. & Eng. Encyc. of Law, p. 1203, that "the fact that the abutting lots vary in depth does not render improper the apportionment of benefits by the frontage methods," and a number of American cases are cited in support of this. This proposition appeals to me as being a very sound one, because it is well known that in city property the value depends far more upon the width and frontage on the street than upon the depths of the lots. It may be that when an improvement is made on the side street it would be quite proper for the assessor to so adjust the assessment as to relieve lot 11 from bearing its full portion according to lineal measurements on the side street; but that is a matter which the assessor will no doubt consider when the time comes. At present I cannot see that sufficient reasons have been given why I should interfere with the discretion plainly given to the assessor by clause (a).

Section 2 of title xxxiv. is of no assistance to the appellant, because the question of area is not mentioned, and the "proportion" there spoken of must refer to the

"proportion" ascertained in the manner specified in sub-sec. 2 of sec. 1.

The appeal will, therefore, be dismissed, and the assessment confirmed; but there will be no costs to either party.

ALBERTA.

SCOTT, J. NOVEMBER 23RD, 1907.

TRIAL.

GREAT WEST IMPLEMENT CO. v. GRAMS.

Promissory Notes—Price of Machine—Failure of Consideration—Evidence—Corroboration—Infant—Sale of Machine to—Retention of Machine after Majority—Ratification of Contract—Amendment—Costs — Counterclaim—Damages.

Action on 3 promissory notes made by the defendant, dated 14th April, 1904, the amount of principal and interest claimed thereon being $423.15. They were given for a shingle machine purchased by defendant from plaintiffs The defences relied upon were that the consideration wholly failed and that the defendant was an infant at the time he signed the notes.

C. F. Newell, for plaintiffs.

O. M. Biggar, for defendant.

SCOTT, J.:—Defendant established the fact that he was an infant at the time he signed the notes, having been born on 21st July, 1884. At the trial plaintiffs' counsel applied to add a reply to the effect that if the defendant was an infant at that time, he did not disaffirm the contract within a reasonable time after coming of age. Counsel for the defendant not objecting thereto, I allowed the application.

The machine was a second-hand one which plaintiffs had for sale. Defendant before seeing it had heard of it and had been told that it was a good machine, but that the blade (or saw) thereof was no good. When dealing with plaintiffs' agent after inspecting it, defendant says he told

the agent that it needed a new blade, and that the agent replied that he would give him a new one. The agent states that defendant spoke about the saw (or blade) at that time, there being 2 or 3 teeth knocked out of it; that he told defendant he thought it could be fixed up; but that he finally told defendant that he would get a new one, and would let him have it at cost price; that defendant asked for a warranty, but he refused to give one, because second-hand machines were not warranted.

Defendant took away the machine a few days after he signed the notes, and never returned it. He stated that he tried it, but could not make it work. He shews that his inability to make it work was entirely due to defects in what he calls the "blade" and what the agent calls the "saw" (both terms meaning the same part) of the machine. He also states that, when he bought it, the agent promised to have a new blade ready for him in 2 weeks; that when he called to take the machine away, one of plaintiffs' workmen was trying to take off the old blade, but could not do so; that he called 3 times for the new blade after the expiration of the 2 weeks, but failed to obtain it. On the last occasion, which was about 2 months after he bought, failing to obtain any satisfactory answer from those he saw at plaintiffs' warehouse, he told them that he did not want the machine any longer.

Defendant shews that at the time he bought the machine he was aware of the defect in it. He appears to have accepted it on the statement of the agent. He says he thought it would work, but there was no warranty by the agent that it would work. I hold also that plaintiffs did not undertake to supply a new blade as part of the consideration for the purchase; that the supplying of it was a different contract, viz., to supply one at cost price. The evidence upon this point was conflicting, but I see no reason to accept the defendant's statement and disbelieve that of the agent. One reason why I should not accept the defendant's uncorroborated statement is, that he was probably in a position to adduce corroborative evidence, as it is shewn that two other persons were with him when he bought the machine, and one of them at least doubtless heard the terms of the contract.

For the reasons I have stated, I hold that the defendant has failed to shew absence of consideration.

Plaintiffs contend that the retention of the machine by the defendant after he came of age must be construed as a ratification or affirmance by him of the contract to purchase.

I cannot find any English case which holds that such would be the effect in the case of a chattel purchased by an infant. In the United States, it appears to be settled that where an infant purchases goods and retains them in his own hands and uses them for his own purposes for an unreasonable length of time after he becomes of age without restoring them to the seller or giving him notice of his intention to avoid the contract, this is a ratification of the contract and renders the buyer liable for the price of the goods: see 16 Am. & Eng. Encyc. of Law, 1st ed., p. 304.

In a recent case in Ontario (Louden Manufacturing Co. v. Milmine, 10 O. W. R. 474, 15 O. L. R. 53, which was an action against an infant, it was held by a Divisional Court that the plaintiff was entitled to leave to amend his statement of claim by setting up an alternative claim for the value of the goods sold to the infant, which were in his hands at majority. Leave to amend was granted and judgment was directed to be entered for such value, but without costs of the action.

I see no reason why I should not follow the course adopted in the latter case, as the circumstances appear to be similar to those of the present case. The plaintiffs will, therefore, have leave to amend their statement of claim by adding an alternative claim for the price of the machine, and, if such amendment be made within one month, plaintiffs to have judgment against the defendant without costs for $362.80.

If such amendment be not made within one month, the judgment will be for the defendant with costs.

The defendant counterclaimed for $500 damages, alleging that plaintiffs contracted to furnish a shingle mill complete, and alleging as a breach that the mill delivered was incomplete by reason of there being no sufficient blade or cutting edge connected therewith.

For the reasons I have stated, I dismiss the counterclaim with costs.

ALBERTA.

SCOTT, J. NOVEMBER 25TH, 1907.

TRIAL.

PETERS v. PERRAS.

Promissory Note—Failure of Consideration—Purchase Price of Horse—Division into Shares—Necessary Number of Subscribers not Obtained—Non-fulfilment of Agreement—Transferee of Note—Holder in Due Course—Interest Overdue at Time of Transfer—Notice of Defects in Transferor's Title—Suspicious Circumstances.

Action upon a promissory note, dated 27th April, 1903, whereby the defendants other than McLaughlin Bros. promised to pay the latter $1,166, 24 months after date, with interest at 8 per cent. per annum, payable annually.

O. M. Biggar, for plaintiff.

N. D. Beck, K.C., and Wilfred Gariepy, for defendants.

SCOTT, J.:—At the opening of the trial plaintiff's counsel filed a discontinuance as against defendants McLaughlin Bros. and Park.

The note in question represented one-third of the purchase money of a stallion which McLaughlin Bros. agreed to sell for $3,500, the remainder being represented by other notes signed by the other defendants. An agreement in writing appears to have been entered into by the makers shortly before the notes were signed.

Secondary evidence of its contents was tendered by the defendants at the trial, and, having been objected to, was rejected by me, on the ground that they had not taken the necessary steps to entitle them to produce it.

The evidence received, however, shews that the transaction was of a peculiar nature. The price of the stallion was to be divided into 14 shares of $250 each, all of which were to be subscribed for by responsible persons in the vicinity of Morinville. When the stock was fully subscribed, a meeting of the subscribers was to be called by McLaughlin Bros., at which the stallion was to be delivered to them.

One Corey, an agent of McLaughlin Bros., conducted the negotiations for them throughout, and obtained the signatures of the defendants to the agreement and notes. The result of the transaction as attempted to be carried out by him would have been that each subscriber would have become liable for the payment not only of his own share, but also of all the other shares.

It may, however, be the case that this somewhat unreasonable result was provided for by the agreement. All the stock was not subscribed. Fourteen subscribers signed the note in question, but 7 of them subscribed for only half shares, of $125 each, and certificates for such half shares upon blank forms purporting to bear the signature of McLaughlin Bros. were issued to them by Corey. It may be and probably was the case that he represented to McLaughlin Bros. that each of the 14 makers had subscribed for a full share.

All those who signed the notes, with the exception of Park, resided in, or in the vicinity of, Morinville, and are well known to each other. No person named William Park appears to be known in that neighbourhood. The only information respecting him appears in the evidence of defendant C. N. Lavalle, who states that when in Edmonton in June, 1903, he met Corey, who introduced him to a Mr. Park, and stated that he was a good man and had land around Morinville.

Corey and others who were with him induced Lavalle on that occasion to subscribe for a half share and to sign the note in question, stating that they were trying to get Park to subscribe, and that he would not do so unless he (Lavalle) would also subscribe. I am led to suspect that Park was not a bona fide subscriber, but that Corey procured him to sign the notes merely to lead McLaughlin Bros. to believe that he had procured subscribers for the 14 shares.

Corey at that time also told Lavalle that he had called a meeting of the subscribers for the following Tuesday or Wednesday to get the names of the rest of the shareholders and to deliver the horse. He never returned to Morinville, and no meeting was ever called either by him or by or on behalf of McLaughlin Bros. About the time the note was signed, Corey and one Hagle, who also appears to have been acting as an agent for McLaughlin Bros., brought a stallion to the stable of defendant O. N. Lavallee, who is a

livery stable keeper at Morinville, which stallion appears to have been the one intended by McLaughlin Bros. for delivery to the subscribers, but no such delivery was ever made, and Lavallee never received any instructions respecting it from McLaughlin Bros. or on their behalf. It was sold by Lavallee under the Livery Stable Keepers Ordinance, in October, 1904, but was bought in by him and remained in his possession up to the trial.

I have shewn that the 14 shares have not been subscribed for, and if each of the subscribers were held liable for the whole amount of the purchase price, and each paid the amount of his subscription, it would follow that each would be called upon to pay in addition at least a proportionate part of the unsubscribed balance, and thus would be subjected to a liability which was not contemplated either by them or by McLaughlin Bros.

Irrespective of any question of fraud on the part either of McLaughlin Bros. or their agent Corey in procuring the note in question, I hold that by reason of the necessary number of subscribers not having been obtained, the agreement was never fulfilled by McLaughlin Bros., and that there was therefore no consideration for the making of the note in question.

The plaintiff contends that he is the holder of the note "in due course" (see Bills of Exchange Act, sec. 56), and that, such being the case, he is entitled to recover upon it.

The evidence relating to the manner in which plaintiff became the holder is to the following effect.

Plaintiff's brother, H. B. Peters, who is vice-president of the Fairfield County National Bank at Lancaster, Ohio, states that on 23rd April, 1905, he received the note from a member of the firm of McLaughlin Bros., with the request that he should give the firm credit on the books of the bank for the proceeds of it; that, at that time, plaintiff had moneys to his credit in the bank which he (H. B. Peters) was authorized to invest for him; that on the day he received the note he bought it for the plaintiff for $1,259.28, charged the amount to plaintiff's account, and credited it to the account of McLaughlin Bros., who chequed it out a few days afterwards; that in purchasing the note, he was acting as agent for the plaintiff; that the amount paid by him for the note represented its face value, with interest from 27th April, 1905; that the amount due upon the note at the

time of giving his evidence (27th May, 1907), was $1,259.28, with interest at 8 per cent. from 3rd April, 1905; that so far as he knew that was the only transaction plaintiff ever had with McLaughlin Bros.

He also states that, prior to the organization of the Fairfield County National Bank, he was a partner in a banking firm carrying on business at Lancaster under the name of "The Fairfield County Bank;" that his firm had been discounting McLaughlin Bros.' paper for a good many years; and that on two occasions they had to bring suit to recover the amount of notes indorsed by that firm; that he is ignorant of the defences set up by the defendants in these actions; that the attorney employed to bring these actions, as well as the present action, was one Webb, who resides at Columbus (where one of the places of business of McLaughlin Bros. is situated), which is distant about 30 miles from Lancaster; that Webb was selected at the instigation of McLaughlin Bros., and that neither his firm, nor, to his knowledge, the plaintiff, ever retained Webb in any other matter; that one of the two suits referred to is still pending; and that neither his firm nor the plaintiff have ever been called upon to pay or advance anything towards the expenses of litigating any of these actions. Both he and the plaintiff deny that they had any knowledge of the fact that the defendants disputed their liability upon the note in question, or that there was any reason why they should not be liable upon it.

The note bears interset from its date, payable annually. No interest has ever been paid upon it, and plaintiff in this action claims interest from its date. I cannot, therefore, understand the statement of H. B. Peters that the amount he paid for it ($1,259.28) represented the amount then due upon it. That amount included only one year's interest, and at that time nearly 2 years' interest had accrued upon it. He may have miscalculated the interest or have been under the impression that the first year's interest had already been paid, though I cannot see that he had any reasonable ground for that belief, as the note was not delivered to him by the firm of McLaughlin Bros. personally, and, having purchased it immediately upon its receipt, he had no opportunity to inquire from them whether it had been paid. Further, if he was under that impression, he must have known that he was paying more than

the principal and accrued interest amounted to at that time, the amount paid being equal to the whole amount he would in that case consider he would be entitled to receive at its maturity. If he did purchase it, the only other alternative is, that he purchased it within less than a month of its maturity at a discount of $87 upon its face value at that time. If the notes were paid at maturity, the investment would yield a return at the rate of nearly 100 per cent. per annum, and if he believed the note was a good note, and he states that he did so believe, he had every reason to expect that it would be paid at that time.

It was held in Ontario by McDougall, Co.C.J., in Jennings v. Napanee Brush Co., 4 C. L. T. 595, and in Manitoba in Moore v. Scott, 5 W. L. R. 8, 381, that the fact that a note shews on its face that interest thereon was overdue at the time of the transfer will have the effect of saddling the transferee with notice of any defects in the transferor's title. I cannot find any English cases in which it has been so held, and in the United States the contrary appears to be the rule, though it seems that there the non-payment is a circumstance for the consideration of the jury, which they may take into consideration in arriving at a conclusion as to the holder's bona fides: see 4 Am. & Eng. Encyc. of Law, 1st ed., p. 305. To my mind, it should at least be considered a circumstance which should put the transferee upon inquiry before purchasing. Even if it is merely a circumstance which I should consider in determining the question of the plaintiff's bona fides, that circumstance, coupled with the other suspicious circumstances I have referred to, especially the fact that all the dealings with the note subsequent to its transfer appear to have been under and subject to the direction of McLaughlin Bros., lead me to the conclusion that the transfer was made by them and accepted by the plaintiff merely for the purpose of avoiding the defences which might be set up, had the note been sued upon by McLaughlin Bros., and that the plaintiff is not a bona fide transferee or a holder in due course.

I give judgment for the defendants with costs.

The defendants have filed a counterclaim, but, owing to the way I have disposed of the plaintiff's claim, it is unnecessary for me to consider it. I dismiss it without costs.

ALBERTA.

SCOTT, J. NOVEMBER 27TH, 1907.

TRIAL.

WARD v. LOGAN.

LOGAN v. WARD.

Promissory Note—Consideration—Sale of Improvements on Land and Interest in Business—Contract—Construction—Homesteader's Interest—Fraud and Misrepresentation.

These were cross-actions which had been consolidated.

Ward in his action claimed $500 under an agreement dated 20th August, 1906, whereby, in consideration of certain goods and chattels sold by him to Logan, the latter agreed to pay him that sum within 30 days from the date of the agreement.

Logan by his statement of defence, besides denying the agreement, alleged that, about the date of the agreement, Ward falsely and fraudulently represented to him that he was the owner of the north-east quarter of section 13, township 57, range 5, west of the 5th meridian, and had authority to sell the same to him, which said representations were false to Ward's knowledge; that he (Logan) believed these representations, and was induced by them and other false and fraudulent representations to make the agreement in consideration of the sale to him of the lands; that Ward was not the owner nor had he the right to sell the same to him.

Logan in his action relied upon the facts set out in his defence to Ward's action, and the further fact that he had already paid Ward $500 under the agreement.

He claimed cancellation of the agreement, the return to him of a promissory note given by him to Ward for the last payment of $500 under the agrement, an injunction restraining Ward from parting with the note, and judgment for the $500 already paid to Ward.

W. B. Allison, for Ward.

C. F. Newell for Logan.

SCOTT, J.:—At the opening of the trial, counsel for Ward applied to amend his statement of claim by striking out the claim under the agreement and certain matter referring thereto, and substituting a claim under the promissory note referred to in Logan's statement of claim. Counsel for Ward objected to the claim under the agreement being struck out. I allowed the statement of claim to be amended by adding the claim under the note as an alternative claim.

Ward settled upon the land referred to in the spring of 1906, before the township was surveyed, and was residing and keeping a small store thereon when Logan reached there about the end of April in that year. Shortly after his arrival Ward induced him to enter into partnership with him in the store business. Logan appears to have advanced the greater portion of the capital required for carrying on and extending the business. The partnership appears to have continued up to the date of the agreement already referred to, and during its continuance the firm erected a new store building on the land.

The agreement is as follows: "Wild Horse Valley, August 20th, 1906. This is to certify that to-day a contract has been entered into between L. C. Ward, party of the first part, and James Logan, party of the second part. The party of the first part agrees to sell and the party of the second part agrees to buy all. The party of the first part quit claim all his interest in store, crop, and other improvements situated on the north-east quarter section 13, township 57, range 5, and for consideration the party of the second part agrees to pay $1,000, $500 to be paid to-day, the balance on or before 30 days from this date, to be paid at the Bank of Montreal, and to receive a receipt of relinquishment thereof. Party of the second part collects all accounts now standing and pay all accounts for goods bought while the firm was doing business. The party of the first part agrees to give peacable possession of the above quarter when the note is paid."

Logan's statement as to what took place between him and Ward relative to the agreement is as follows: "About first or second week in August Ward told me he wanted to sell out and go and see his father; that a friend in the government offices at Ottawa had arranged for him to sell the land; that he had given me a good start in the valley,

and would let me have the land for $1,000. I believed Logan had the right to sell the land, and if I had not believed that, I would not have given him the money."

Logan also states that another agreement was drawn up before the agreement in question, but he refused to sign it, because no land was mentioned in it, and that it was the land Ward was selling him, and nothing was said about the improvements. He admits that the agreement in question is in his handwriting, but states that he wrote it at Ward's dictation.

One Williams settled upon the land about 6 months before Ward and it was only in May, 1906, during the survey of the township, that they discovered that they had settled upon the same quarter section. This caused trouble between them, and Williams offered to sell out to Ward for $150. The latter said he would have to consult Logan about it, and shortly afterwards he and Logan went to Williams's house. Williams then stated in Logan's presence that he had his squatter's right and his improvements to sell, and Ward then agreed to buy for $150.

Ward was not examined as a witness at the trial, and therefore Logan's evidence as to the representations made by Ward are uncontradicted. It does not appear, however, from his evidence, that Ward ever represented that he was the owner of the land.

The only representation made by him upon which any doubt is cast, is that a friend in Ottawa was arranging for him to sell the land. This, in itself, ought to have shewn Logan that Ward was not the owner. If he was, it would not have been necessary for him to resort to the assistance of a friend to obtain permission to sell. It was not even a representation that he had the right to sell. At most it conveyed that he expected to obtain that right, and there is nothing to shew that he did not so believe or that he had not reasonable grounds for so believing.

Having himself written out the agreement and having been fully aware of its contents, I cannot understand how Logan could have construed it as an agreement to sell the land and the land alone.

It plainly shews on its face that it is merely a quit claim of Ward's interest in the store, crop, and other improvements upon the land. It was also intended by the parties to be an assignment of his interest in the partnership business.

The $500 payable under the agreement and the note given therefor were not, as asserted by Logan, given for the purchase money of the land alone, and therefore, so far as the note is concerned, there could not be in any event an entire failure of consideration.

What took place during the interview between Williams, Ward, and Logan must have shewn the latter that Ward's object in buying out Williams was merely for the purpose of getting rid of a prior claim and strengthening his own claim as a squatter, and the fact that Ward paid $150 for that purpose points to the conclusion that he then thought that he was acquiring the right either to homestead or purchase.

I give judgment for Ward upon the promissory note made by Logan for $529.50, with costs of both actions.

ALBERTA.

SCOTT, J. NOVEMBER 27TH, 1907.

TRIAL.

CITY OF EDMONTON v. MACDONALD.

Municipal Corporations—Expropriation of Land for Market Site — Necessity for By-law — Edmonton Charter, Construction of.

The statement of claim alleged that the council of the plaintiffs desiring to acquire lots 39 and 40 in river lot 8 for the purpose of a market site, the commissioners of the plaintiffs deposited with the secretary-treasurer thereof plans and specifications shewing those lots as the land to be taken, and the name of the defendant as owner thereof according to the last revised assessment roll, said plans being deposited on 8th June, 1905; that immediately after that date the secretary-treasurer notified the defendant of the deposit of the plans and specifications and of the date of such deposit, and that all claims for compensation for land and the amount and particulars thereof must be filed with him within fifteen days of such deposit: that, by reason

of these proceedings, the land had been duly acquired by the plaintiffs, who were entitled to the beneficial ownership and possession thereof; but the defendant denied that the plaintiffs had acquired any right, title, or interest in the land; that the commissioners had offered to pay the defendant $7,500 as being the value of the land, but he refused to accept the same or to make any claim for compensation in respect to the land; and plaintiffs claimed a declaration that by means of the proceedings referred to they had acquired the land and were entitled to the beneficial ownership and possession thereof.

N. D. Beck, K.C., and C. F. Newell, for plaintiffs.

O. M. Biggar, for defendant.

SCOTT, J.:—Lucy Macdonald, the registered owner of the land in question, who was the wife of the defendant, died in 1901, leaving her surviving the defendant and two children, who are still infants. Letters of administration to her estate were granted to the defendant on 16th October, 1901, and subsequently a certificate of title to the lands was issued to him as such administrator.

The commissioners on 8th June, 1906, filed with the secretary-treasurer a plan shewing the lands in question and other lands as being "required for market purposes," etc., but the names of the owners or occupants thereof were not shewn on the plan. Immediately after the filing of the plan the secretary-treasurer mailed to the defendant a notice of the filing thereof, and that claims for compensation must be filed within 15 days from the filing thereof.

One of the objections taken on behalf of the defendant to the regularity of the expropriation proceedings is that, the lands being required for market purposes, they can only be acquired under a by-law which has received the assent of the majority of the ratepayers voting thereon.

Section 3 of title 22 of the Edmonton charter provides that every by-law for acquiring sufficient land for the convenient carrying on of (among other things) markets, shall, before the final passing thereof, receive the assent of the majority of the burgesses voting thereon.

The only by-law relating to the acquiring of the lands in question is by-law No. 24, which was provisionally passed by the council on 14th July, 1905, which by-law, after re-

citing that the council deemed it expedient to purchase these lands and other lands for the purpose of extending the then present market site, and that the amount required to purchase the same was estimated at not exceeding a certain sum, proceeded to provide for the raising of that sum by the issue of debentures. It is not shewn that this by-law received the assent of the burgesses, but, if it was submitted to them, it was not submitted until long after the filing of the plan referred to

Section 1 of title 28 is as follows: "In case the council desires to acquire land for any purpose authorized by this Ordinance, the commissioners of the city of Edmonton, in case they cannot acquire the land at a fair price by agreements with the owners or occupiers thereof or other persons interested therein, may acquire the same by expropriation in the name and on behalf of the city."

In my opinion, the provisions of the last mentioned section must be held to be subject to those of sec. 1 of title 22, and, therefore, the power to expropriate lands for market purposes cannot be exercised until a by-law for that purpose has received the assent of the burgesses. The effect of the expropriation proceedings is the acquiring of the land by the city, and, if the lands could be so acquired without a by-law, or before a by-law is assented to, where is the necessity for such a by-law?

It was contended on behalf of the plaintiffs that the council might take the necessary steps to expropriate in advance of the by-law, and in the anticipation that it would afterwards be assented to.

The effect of this would be that the council, by such a proceeding, would be enabled to tie up lands and prevent for an indefinite time any other disposition by the owners, and in the event of the by-law not receiving the assent of the burgesses, the owners could not, so far as I can see, have any claim for damages. Such a claim could only exist where the council has the power to acquire the lands without the assent of the ratepayers or burgesses.

The powers conferred upon the council by sec. 1 of title 28 are similar to those conferred upon municipal councils in Ontario by sec. 439 of the Ontario Municipal Act (R. S. O. 1897 ch. 223), but there those powers are not restricted by any such provision as that contained in sec. 3 of title

22 of the Edmonton charter, and, where lands are authorized under that Act to be acquired for any municipal purpose, the council appears to be authorized to acquire them without the assent of the ratepayers.

I give judgment for the defendant with costs.

ALBERTA.

SCOTT, J. NOVEMBER 19TH AND 27TH, 1907.
STUART, J. DECEMBER 11TH, 1907.

TRIAL.

LOUGHEED v. HAMILTON.

Pleading—Statement of Defence—Denial — Inducement—Admissions—Fraud—Summary Judgment — Mortgage.

Motion by plaintiff for judgment on admissions in the statement of defence. The action was for a declaration that a mortgage given by the defendant Hamilton to the plaintiff's predecessor in title was an incumbrance on lands for which a certificate of title had been issued to Hamilton's co-defendant, Phillips, on the same day as the mortgage was executed, and consideration paid over, by what the plaintiff alleged was a fraudulent device to defeat the mortgage. The statement of claim also asked for the usual remedies by way of foreclosure or sale. The defendant Phillips did not deliver any defence. The defendant Hamilton delivered a defence in which he stated in answer to each of the paragraphs of the statement of claim: "The defendant specifically denies the allegations contained in paragraph of the statement of claim."

C. C. McCaul, K.C., for the plaintiff, moved for judgment as on admissions, on notice of motion personally served on the defendant Hamilton.

No one appeared for the defendant Hamilton.

SCOTT, J.:—Notwithstanding the fact that the defendant has not appeared upon the motion, I require to be satisfied that it is proper to grant the judgment asked for.

McCaul, K.C., arguendo. The only case in England that can be quoted in support of this pleading is Adkins v. Metropolitan Tramway Co., 63 L. J. Q. B. 361, 10 Times L. R. 173. This is referred to in Odgers on Pleading, 5th ed., for the statement that a defence so worded is good in respect only of matters of inducement. Mr. Justice Wetmore refused to follow this case in Smith v. Canadian Pacific R. W. Co., 21 C. L. T. Occ. N. 193. See also Daniel v. Canadian Pacific R. W. Co., 6 W. L. R. 538. Compare leading article in 17 C. L. T. p. 85.

Cur. adv. vult.

On 27th November, SCOTT, J., delivered judgment, stating that he was not satisfied that the pleas were wholly bad, especially as an answer to the 8th paragraph of the statement of claim, which alleged that the arrangements had been entered into by the defendants in fraud of the plaintiff; and refused the application.

The action was afterwards set down at the Wetaskiwin sittings, pursuant to order of BECK, J., for judgment in default of pleading against the defendant Phillips and for judgment on admissions in the statement of defence against the defendant Hamilton, or in the alternative for examination of witnesses and hearing.

C. C. McCaul, K.C., for the plaintiff, moved for judgment against Phillips in default, and against Hamilton on the admissions, and referred to the above decision of SCOTT, J., and repeated the arguments presented to that learned Judge.

STUART, J.:—With great deference to the opinion of Scott, J., I prefer to follow the decisions of Wetmore, J., in the cases cited. I may say that it has always been my opinion that Adkins v. Metropolitan Tramways Co. was wrongly decided. Judgment will go for the relief asked in the statement of claim against both defendants. Minutes to be prepared and submitted to me for approval.

ALBERTA.

SCOTT, J. NOVEMBER 29TH, 1907.

CHAMBERS.

BISHOPRIC v. YORK.

Pleading—Statement of Defence—Leave to Amend by Setting up Fraud.

Application by defendants for leave to amend the statement of defence.

The action was to recover instalments of purchase money alleged to be due by the defendants to the plaintiff on an agreement for the sale of land. The defendants applied to amend the statement of defence by setting up an allegation in effect that the plaintiff had untruly and fraudulently represented to them that he had, prior to the agreement of sale, already practically effected a sale of 10 out of the 150 (more or less) town lots, the subject matter of the agreement for sale, at a price of $5,000, and that he would, in a few days after the agreement for sale, bring the purchaser of the 10 lots into the office of the defendants, so that the defendants could complete the sale, receive the $5,000, and apply it in payment to the plaintiff, the vendor, as the instalments of purchase money fell due on the agreement of sale. The defendants' affidavits alleged that, although they had had knowledge of the fraud for some months previously, in giving instructions to their solicitors to defend they had forgotten to mention the subject of fraud at all. It appeared from the affidavits and cross-examinations that the defendants had discovered the alleged fraud within a few days after the execution of the agreement of sale; that one of the defendants, at the time the agreement for sale was being drawn up in a solicitor's office, when all the parties were present, suggested that this might be made a term of the contract; but that his co-defendant, and the solicitor, stated that there was no necessity for so doing. It was also admitted by this defendant that when the purchasers found that the values of real estate were decreasing, he had conceived the idea that the

contract might be set aside on the ground of the alleged fraud, and that he intended to avail himself of it; that the entire condition of the real estate market had changed for the worse since the agreement for sale had been executed; that the defendants had sold a large number of lots, in respect of about half of which absolute transfers had been executed. There was no satisfactory evidence of any complaint having been made to the plaintiff in respect of the alleged fraud prior to the commencement of this action. The original statement of defence traversed the correctness of the account as stated by the plaintiff, and in paragraph 5 contained the allegation that the true balance due to the plaintiff was dollars, which the defendants were and are "always ready and willing to pay." No amendment of this paragraph was asked for.

C. F. Newell, for the plaintiff. Amendments will be allowed in all cases where the opposite side can be compensated in costs. The rule that amendments setting up fraud will not be granted is no longer good law: Elmsley v. Harrison, 17 P. R. 425, 525; Harrison v. Boswell, 8 O. W. R. 635.

C. C. McCaul, K.C. (J. D. Hyndman with him), for plaintiff. We admit that the Court should be liberal in granting amendments, and that the principle is correctly stated by Mr. Newell. The Court, however, does not favour amendments setting up fraud, especially when there is no excuse for the delay. We admit that James v. Smith, [1891] 1 Ch. 384, is a hard case, and not binding on this Court. See, however, Bentley v. Black, 9 W. R. 589; Hendricks v. Montague, 17 Ch. D. 642, per Jessel, M.R. The Court will inquire into the materiality of the proposed amendment: Laurence v. Lord Norreys, 39 Ch. D. at pp. 221, 235. Here we submit that we can shew that, if the proposed amendment had been part of the original statement of defence, the Court would, on application in Chambers, have struck it out, on affidavit evidence, that it was frivolous and vexatious: McCarthy v. Barten, 15 C. L. T. Occ. N. 198, 314. It is absurd for the defendants at this stage to attempt to allege fraud. Under these circumstances the amendment should not be allowed. The representation as made was a representation of intention as to a future fact, namely, that the plaintiff would produce a purchaser

for 10 lots at the office of the defendants, who would pay the $5,000. This could and should have been inserted in the written agreement: Leake on Contracts, p. 231, and cases cited; Ewart on Estoppel, pp. 68-79. Restitutio in integrum is impossible: Kerr, p. 339; Page on Contract, pp. 137-138; Clough v. London and North Western R. W. Co., L. R. 7 Ex. 34; Kerr, p. 10. Innocent third parties have acquired interests in the property: Kerr, pp. 340, 341. There has been no repudiation, and the property is admittedly of speculative character: Kerr, pp. 314, 316; Wentworth v. Lloyd, 32 Beav. 467. Compare also Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 240; Leake on Contracts, pp. 254-5.

SCOTT, J.:—The action is for moneys payable under an agreement for the sale of land by plaintiff to defendants.

Defendants now seek by their proposed amendment to allege that they were induced to enter into the agreement by the fraud of the plaintiff and certain false and fraudulent representations made by him, and to claim the cancellation of the agreement on the ground of such fraud.

The affidavits filed by the defendants verify the allegations of fraud made in the proposed amendment. Defendant York gives as a reason for the fraud not having been originally pleaded, that he omitted instructing his solicitors respecting it until after the defence was filed, and until a few days before this application was made, and that he did not think of doing so at the time he gave instructions for the defence, while defendant O'Coffee states that he did not instruct them upon the point because he overlooked the matter. and that he was ill with typhoid fever.

Defendants in their cross-examination upon their affidavits, while maintaining their assertion that the representations relied upon as constituting fraud were actually made, and were the inducement for their entering into the contract, shew that their acts under the contract were such as might lead to the conclusion that they had waived their right to rely upon them as a ground for avoiding the agreement.

It has been held in a number of cases in England that where fraud is not charged in a pleading an amendment setting it up will be allowed only under exceptional circumstances: see Bentley v. Black, 9 Times L. R. 380; Hendricks

v. Montagu, 50 L. J. Ch. 456; Lever v. Goodwin, [1887] W. N. 107; but in Riding v. Hawkins, 14 P. D. 56, a plaintiff was allowed to amend during trial by setting up fraud on the part of the defendant, and the Court of Appeal held that the leave to amend was properly granted. In that case the onus of proof was on the defendant, and it was at the conclusion of defendant's case that the application to amend was made.

I think that an application by a defendant to set up fraud as a defence to the action should be entitled to greater consideration than one by a plaintiff to set up what practically would be a new cause of action, and in the present case the amendment should be allowed, notwithstanding the fact that the defendants omitted to advise their solicitors of the fraud when giving them instructions to defend. That is, I think, a circumstance for the trial Judge to take into consideration.

The question whether their contract subsequent to the agreement constituted such a waiver on their part as would disentitle them to rely upon plaintiff's fraud, is a question which I think should not be disposed of upon this application.

Order to go giving leave to amend as applied for; costs of the application and of and occasioned by the amendment to be costs in the cause to the plaintiff in any event.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 28TH, 1907.

CHAMBERS.

RE MACLENNAN.

Mines and Minerals—Yukon Placer Mining Act—Application for Grant by Member of North-West Mounted Police—Refusal of—Orders in Council—Regulations of Department of Interior—Public Policy—Mandamus.

Motion by John T. Maclennan for an order for a prerogative writ of mandamus to compel the acting Gold Commissioner, E. C. Senkler, and the chief Mining Recorder, Victor G. Grant, to issue a grant to the applicant of creek placer mining claim No. 10 above Discovery on Fall creek, a tributary of Gates creek, in the Forty Mile mining division, Dawson district, under the Yukon Placer Mining Act.

George Black, for the applicant.

E. C. Senkler, in person, and for the Recorder.

CRAIG, J.:—The applicant staked the claim under the Placer Mining Act, and it is admitted that his staking is regular, and all the proceedings taken subsequent to the staking are regular, the proper application being filed, the proper demand made, and the proper fees tendered.

The Placer Mining Act, being R. S. C. 1906 ch. 64, lays down the proper steps to be taken to entitle a person to a grant of a placer mining claim. All these conditions have been fulfilled by the applicant. The Act itself contains no limitation or restriction in regard to persons who may stake, and it is admitted that none of the restrictions, if there are any contained in the Act, apply to this applicant. Apparently under the Act he is entitled to the issue of the grant which he asks for. The only answer made to the motion is the production of a letter from the Department of the Interior dated 17th June, 1907, as follows:

"Department of the Interior,
"Ottawa, 17th June, 1907.

"The Commissioner of the Yukon Territory:

By an order in council dated 29th March, 1899, provision was made that no officer or person employed by the government of Canada, in any capacity whatever, in the Yukon Territory, should stake out or record in his own name, or in the name of any other person or corporation for his benefit, any mining claim in the said Territory, nor act as the agent of any person or corporation with respect to the staking, recording, purchase, or acquisition of any mining claim or property, or any Dominion lands, in the said Territory, the penalty for violation of this provision to be dismissal from the public service.

"The Yukon Placer Mining Act, which came into force on 1st August last, did not contain this provision, and inquiry has been made as to whether or not officials of the government in the Territory may traffic in mining property.

"This order in council still forms a portion of the quartz mining regulations, and the Minister decided when you were present on the 13th instant that the prohibition contained in the above order in council shall continue to apply to officers of the Department of the Interior in the Yukon Territory, the penalty for violation to continue the same, namely, dismissal.

"The Minister also gave instructions that the several other departments of the government represented in the Yukon Territory should be advised as to the position which this department has taken in respect of the matter in question. The action referred to is now being taken, and this memorandum is forwarded to you in order to remind you of the Minister's decision. H. H. Rowatt."

Reference is also made to the order in council of 29th March, 1899, referred to in that letter, that order being as follows:—

"1. No officer or person employed by the government of Canada in any capacity whatever in the Yukon Territory, and no officer or member of the militia or of any military force stationed in the Yukon Territory, and no officer or member of the North-West Mounted Police stationed in the said Territory, shall stake or record in his own name, or in the name of any other person or corporation for his benefit, any mining claim in the said Territory, nor shall any such person acquire or become the purchaser from the Crown of any Dominion lands in the said Yukon Territory, nor shall any such person acquire by purchase or otherwise any mining claim of any kind or description whatsoever in the said Yukon Territory.

"2. No person to whom the prohibition in the next preceding clause applies shall act as the agent of any person or corporation in or with respect to the staking, recording, purchase, or acquisition of any mining claim or property or any Dominion lands in the said Territory.

"3. Any person guilty of violating any of the provisions of this order in council shall be liable to dismissal from the public service or from the military or police force, as the case may be.

"4. This order in council shall come into force upon being proclaimed by the Commissioner of the Yukon Territory."

It is argued that under this letter and this order in council the mining recorder was justified in refusing to issue the grant in this case, because the applicant was at the time of staking a member of the North-West Mounted Police of Canada. There is no evidence to shew me—in fact it is denied and not answered—that the applicant, although a member of the North-West Mounted Police at the time of staking, was under the authority of the Department

of the Interior or of the Minister. It is in evidence that since the staking and after the application he left the service and is not now a member of the Police Force, and there is no conflicting claim. The only question then left to consider is the effect of this letter and the order in council. The letter contains a direction, initialled by the Commissioner of the Yukon Territory, to the officers of the Department of the Interior to note, and upon the margin of the letter appear the signatures of what I presume to be all the officers of the Department of the Interior employed in and about the Commissioner's office and the Gold office, indicating, although no evidence is offered on that point, that these men at least considered themselves subject to the orders and directions of the Department of the Interior communicated to them by letter.

Under the regulations in force prior to the passing of the Placer Mining Act, mining in the Yukon and the grants of mining property were regulated by order in council passed by the Governor in council under the authority of the Dominion Lands Act, sec. 47. This section provides that "lands containing coal or other minerals, including lands in the Rocky Mountain Park, shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor-General in council may from time to time make regulations for the working and development of mines on such lands and for the sale, leasing, licensing, or other disposal thereof."

Under this section all the orders in council affecting placer mining in this Territory have been passed, including the order in council of 29th March, 1899. This last order in council was consolidated in an order in council passed on 13th March, 1903, and was embodied in the consolidation of the quartz mining regulations, and still continues in them. The Placer Mining Act of 1906 repeals and rescinds all the forms, regulations affecting placer mining, the words of the section—92—being: "The regulations governing placer mining in the Yukon Territory approved by order in council dated the 13th day of March, 1903, and the regulations for the disposal of the right to divert and use water from any stream or lake for mining purposes, approved by order in council dated the 3rd of August, 1898, and all amendments thereto, whether by Ordinance or regulations of the Governor in council, are hereby

rescinded and repealed." And this Act was in force at the time of the staking in question.

It is contended that the officers in the Gold office here to whom the application is made, and against whom the motion is directed, are subordinate officers of the Minister, and subject to the rules and directions of the Department of the Interior. No such provision can be found in the Placer Mining Act. It is a complete code passed by Parliament for the regulation of placer mining, including the issue of placer mining grants, and nowhere in the Act is the Minister mentioned as one having direction of the administration or any control over it. But it appears that the entire duties of the officers named therein, who were appointed by the Governor in council, are laid down in the Act; so that all the duties of the officers are statutory and positive. Under the Dominion Lands Act it is quite clear that the Minister of the Interior had direct control and supervision of the sale of lands under that Act. In sec. 5 it is provided that "the Minister shall have the administration and management of the Dominion lands, and such administration and management shall be effected through a branch of the Department of the Interior." What are Dominion lands which are to be administered under the direction of the Minister are described in the Act, and are described in sub-sec. (g) of sec. 2, as "any lands to which the Act applies." I am of opinion that the Act does not apply any longer to placer mining claims, because they are taken out of the Act by a separate and subsequent Act of Parliament, which regulates dealings with them. If the Minister had by the Act control of the administration, it might be argued with some force that mandamus would not lie against a subordinate officer who refuses to issue a grant in compliance with or under instructions from the Department at Ottawa. Again, if we consider the letter under which the recorder refuses to issue a grant, we can see nothing in it which orders him to refuse grant. The letter referring to the order in council states that the Yukon Placer Mining Act did not contain this provision: that it forms part of the quartz mining regulations; and that the Minister has decided that the prohibition should apply to officers of the Department of the Interior; and that, so far as it affects other officers of other departments,

it is under consideration. It might very well be denied that, even if Maclennan were an officer of the Department of the Interior, the Minister had any right to decide to refuse him a placer mining claim after the passing of the Placer Mining Act. I have already held, and the Court en banc has held, that letters from the Department have no power to affect or alter an order in council; much less would the decision of the Minister to refuse any one a placer mining grant have any effect against the positive enactment of a statute. Again, considering the original order in council and the letter, the only penalty which follows directly from the wording of the order in council or the letter is the loss of position, that is, the application for a placer mining claim by an officer of the government subjects that person to dismissal. This might very well be a departmental regulation which could be enforced against the officers of the department.

It is argued that on the grounds of public policy the grant should not issue. I could very well give force and effect to such an argument so far as it might affect the officers directly interested in the issue of such grants, who might be supposed to have superior knowledge and inside information which gives them an undue advantage over other applicants, but that can certainly not arise in the case of an officer of any other department not actually engaged in carrying out the provisions of the Placer Mining Act. So that that argument carries very little force, to my mind. And, again, this party is no longer a member of the force, and he stands in exactly the same position as any other citizen, and I cannot see why he should be deprived of the right which every other citizen, and alien even, in this Territory has, to stake and obtain a placer mining claim. I think the Recorder has no liberty of choice in the matter, and that he must perform his statutory duty of issuing this grant. I have already in very lengthy judgments gone into the question of whether mandamus is the proper remedy or not in such a matter as this, and I need not repeat the arguments contained therein.

I am of opinion that an order should go for a writ to compel the proper officers mentioned in the rule to issue the grant to the applicant as applied for.

There will be no costs to either party.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 22ND, 1907.

TRIAL.

MOORE v. MACRAE.

Partnership—Account—Misconduct of Partner—Damages—Failure to Prove Special Damage—Nominal Damages.

Action for a partnership accounting and for damages alleged to have been caused by the misconduct of the defendant partner.

George Black, for plaintiff.

F. T. Congdon, K.C., for defendant.

CRAIG, J.:—It is alleged that the defendant wrongfully used moneys belonging to the partnership and made gains and profits out of them; that he collected and received large sums of money belonging to the partnership, and applied the money to his own use, and has not accounted; that he made false statements concerning the assets and affairs of the partnership, and discredited and injured the reputation and standing of the partnership; and an accounting and damages and costs are asked.

The defendant denies the charges and allegations made, and alleges that he has never refused to render an account. Particulars were ordered and served of the allegations made in the statement of claim, the main claim being that the defendant collected 3 certain sums, one from the Sour Dough Coal Company of $2,609.30, one from the Dawson Electric Light and Power Company of $417.54, and one from the Canadian Forty Mile Dredging Company of $551.84; that he made a false and incorrect statement to the Bank of Commerce of the assets of the firm (which false statement is set out in the particulars); that he misrepresented a certain purchase made from Chatterton & Co., alleging that the goods were to be bought on a 90 days' credit, whereas as a fact they were bought for cash or 30 days, thereby injuring the credit and business of the partnership.

The evidence in the case is as follows. The partnership was formed, under the name of the Hunker Mercantile Company, on 30th June, 1905, to run from 2nd July, 1905, for one year, both parties to put in equal stock, Moore to draw a salary of $200 a month and Macrae $100. The business

was carried on in the city of Dawson and at the village of Gold Bottom, some 20 miles from Dawson. As already stated, the main cause of complaint by the plaintiff against the defendant is that he collected the first-named sums, used the money, and denied the collection. Macrae now admits that he did collect these sums some time in the early part of October, 1906. Moore swears that he spoke to Macrae in December about these accounts, amounting in all to $3,578.68; that Macrae said that he had spoken to Dr. Grant, who was the debtor or acting for the debtors, and that he (Grant) said he was short, but would pay in the spring. Moore repeatedly asked Macrae again if these sums were collected, and Macrae always denied the collection of them, and never acknowledged that he had collected the sums until 8th May, 1907. It appears from the evidence that the firm had a bookkeeper, Munroe, who attended to the business of the firm and kept all the books. It was not usual for either of the partners to make any entries in the ledgers or final books of entry. On 1st December, 1906, Macrae being about to go out of the country to the outside, had with Moore and Munroe a settlement of the balances owing by each partner to the partnership, and on that date Macrae gave his note for $2,623.17, and Moore his note for $1,786.98, being the admitted balances owing by each partner to the firm. The bookkeeper was present, and both the bookkeeper and Moore swear that Macrae examined the accounts and was satisfied with the balances fixed by the note. Macrae was outside during the winter of 1906-07, returning early in the spring. and still denying the payment of the accounts. Moore, being dissatisfied with the answer, and being assured that the accounts had been paid by Dr. Grant, made an appointment for Dr. Grant to meet Macrae at the office of the firm. Dr. Grant appeared, Macrae being also present. Macrae asked Dr. Grant to step into the back office for a moment's conversation. He did so, but never came back to meet Moore. Regarding this interview Grant says that he remembers this meeting in the store and Macrae asking him to go outside and when he had him outside telling him it was not necessary that he should go back to see Moore, but that he (Macrae) would attend to the matter. Grant, of course, confirms the payment of these debts between 1st and 6th October, 1906.

The principal and in fact the only creditors of any importance of the firm were Kelly, Douglas, & Co., and W. H.

Malcolm & Co., of Vancouver. Representing Kelly, Douglas, & Co. was J. M. Sandels, and representing W. H. Malcolm & Co. was George D. Travis, both being in Dawson and having certain powers given them by their principals in regard to credits and extensions of credits. At a time prior to the payment of the accounts alleged, the Hunker Mercantile Company—the firm in question—was indebted to each of these principal creditors in about $12,000. These creditors were pressing for payment, and had access to the books of the firm to learn what their assets were and their chances of payment. They saw these accounts on the books of the firm and asked if they still were unpaid and an asset of the firm. They were told that the accounts were still an asset of the firm. It seemed strange to the creditors that these accounts should remain unpaid so long. Both these persons, knowing the standing of the debtors and suspecting that the accounts had been paid, asked Macrae if the accounts had been paid. Macrae repeatedly to these persons denied the payment of the accounts, and asserted that they were still an asset of the firm. That Macrae denied the collection and claimed that the accounts were still assets, is also sworn to by the bookkeeper Munroe.

The notes given by Moore and Macrae settling their balances in December, 1906, were indorsed on 1st May, 1907, with the balances then alleged to be due by each of the partners. The indorsement is in the handwriting of the bookkeeper, but both he and Moore swear that Macrae was present and saw the indorsement made, after satisfying himself, on an examination of the books, that the amount was correct. Macrae denies that he stated that the accounts were unpaid, saying that he always said that he was responsible for the accounts. His answers were not candid, but, to my mind, were evasive. Further evidence of his evasiveness and misconduct is shewn in the fact that when he collected the accounts, as he did admittedly between 1st and 6th October, 1906, he did not make any entry in any of the books of the firm. He certainly did not convey the information either to Moore, his partner, or to Munroe, the bookkeeper, that he had this money in his pocket. He had it and held it from October, and has it until the present time. On 8th May he admitted the collection, and in his own handwriting he entered in the books of the firm opposite these 3 respective accounts, "Settled by the note of D. A. Macrae," and on that date he gave one inclusive note for the whole 3 amounts, that

is, the sum of $3,578.68, writing into the note, "with interest at the rate of 8 per cent. per annum until paid." The weight of evidence is entirely against Macrae. Four witnesses, whose testimony is not shaken in the slightest degree, swear positively to his statements. His own evidence on the point is unsatisfactory and evasive. His conduct in regard to the matter also confirms the evidence of the other 4 witnesses. The fact that he did not enter the collections when made is certainly gross misconduct on the part of a partner. The fact that he settled his balances by a note is evidence of non-admission of the collection of these sums, because they were certainly not involved in the note covering the settlement, and the fact of his entry, in his own handwriting, in the ledger, which is an unusual thing, of a settlement by his own note, further proves the fact of his denial up to that time of the collection. Further, his conduct in relation to the interview with Dr. Grant, who came specially to see about this matter with the partners, is evidence of his evasiveness and attempt to conceal the real facts from his partner Moore. During this time the firm was paying 8 per cent. interest per annum to the creditors and 12 per cent. interest per annum on their bank account. They had an account in the Bank of Commerce on which they received advances on deposit of warehouse receipts, and another account—an overdraft account—which they were allowed upon statements of their standing. In connection with this it is shewn that Macrae, at the request of the bank, furnished a statement of the firm's assets, which Moore says was entirely wrong, being given in double the value of the assets which the firm held, as represented by Macrae. This was given by Macrae shortly before he left for the outside in the fall of 1906. Moore, being asked for a confirmation of the statement by the manager of the bank, refused to confirm it, and thereupon their overdraft account was cancelled in the bank. It is not shewn that any damage resulted by this, as no credit had been obtained from the bank on the strength of Macrae's statement, except that the stopping of the overdraft might have the effect of embarrassing the firm. However that may be, the overdraft account was stopped and closed. It is further shewn that Macrae made a false statement to his partner and to the principal creditors regarding the purchase of a certain stock of goods from Chatterton & Co. He represented to his partner Moore that he could obtain a certain stock of goods valued at $14,000 on favourable

terms of long credit, that no immediate cash would be required. This he also stated to the principal creditors or their representatives, Sandels and Travis, saying that these goods would come into stock and be sold and relieve the pressure of the liability to these two creditors, whereas the facts were that $8,000 of the firm's cash was immediately applied to pay for this new stock, and the balance had to be paid in 30 days. It is not shewn with any clearness what effect this had upon the partnership business to its damage, except that it created discontent in the minds of the principal creditors and want of confidence in the statements of the firm. It was again shewn that Macrae signed cheques in the name of the firm for his own private purposes, namely, cheques to Schultz, Anderson, Crowley, Lyons, and the Bank of British North America, in all amounting to $274.80, without entering them in the firm's books. It is further shewn that he sold some hay for the firm, receiving the cash therefor, about $800, and did not account for the same to the firm. The partnership which was to run for one year was by a verbal arrangement continued for another year, and it was the intention of the partners to wind up the business and dissolve some time in the summer or fall of 1907. Sandels and Travis, the representatives of the principal creditors, assert that owing to the discovery of this deceit on the part of Macrae in these several matters, they insisted upon an assignment being made to them for the benefit of creditors, and that it was owing to these misrepresentations that they insisted upon this assignment being made. It is also true that prior to the assignment and during the winter and spring of 1906-07, the creditors were pressing for payment and threatening action, and that in any event the business of the firm would have been wound up either by suit on the part of the creditors or by liquidation on their own behalf some time in the summer or fall. Just how far the action of Macrae accelerated the closing of the firm is a matter about which I am in some doubt. Moore's contention is that but for Macrae's conduct the firm would have been allowed to close up the business themselves in the ordinary way, and much better results would have been obtained on the sale than were obtained by the liquidators. The trustees made an inventory of the stock, putting the prices at Dawson wholesale prices on the day of the inventory, that is, what the cost of the goods would have been, delivered at Dawson, to the dealers.

It would seem that these prices at least should have been obtained on a re-sale, but the sale of the goods resulted in a loss of about $800 to the firm. It is contended on behalf of Macrae that in any process of liquidation this loss would have resulted, and the trustees admit that fair sales were made by them as trustees. Moore says if the firm had been allowed to go on until the fall, as it was intended, that by filling in the stock they could have sold at least at invoice prices and perhaps for some trade profit. I would be inclined to think that probably wholesale prices, delivered at Dawson, should have been obtained for the goods, if a reasonable time had been allowed for sale, but I am not satisfied that I can come to that conclusion upon the evidence. So many elements of doubt enter into the consideration of the matter: first, the question of the pressure of the creditors who were threatening action at the time; next, the uncertainty of the market as to the prices to be obtained; and finally, as to how long liquidation would have been allowed to go on by the firm itself. The termination was uncertain. What was certain was that it was the intention of the partners to close up the business as speedily as possible, and in such a sale buyers, knowing of the closing out, would not be disposed to give full market prices. If I were certain that the creditors would have allowed the firm to go on for a reasonable time in the ordinary way, and that both the partners would have continued to work harmoniously until the stock had been disposed of in the ordinary way, then I certainly would find that damage amounting at least to the difference between the sum realized and wholesale invoice prices should be charged against Macrae.

The first question to consider is what damages, if any, shall I allow for Macrae's conduct. That a partner has a right to collect damages I am quite convinced now from the law. I refer first to the case of Cheesman v. Price, 35 Beav. 142, a case somewhat similar to this, where a partner collected moneys and did not enter them in the firm's books, and the comments of the Master of the Rolls in the case are very much in point where he says: "The charge that sums were received by Mr. Cheesman which were never entered in the accounts, is one of a much more serious character, and one which, in my opinion, affords ample foundation to justify Mr. Price in giving notice of dissolution." And in this case such facts shewn would justify the appointment of a receiver. There is also the case of Hamer v. Giles,

11 Ch. D. 942; also Ex p. Smith, In re Hay, 6 Madd. 2, where it was held that "if a managing partner draws out moneys and conceals the fact or disguises it in the partnership books, this is a fraud." Also Smith v. Myles, 9 Hare 569, and Lindley on Partnership, Bl. ed., pp. 563, 591, and 632; also Davison v. Thirkell, 3 Gr. 330; Kintrea v. Charles, 12 Gr. 123; and Doupe v. Stewart, 13 Gr. 637. In this latter case the words of Mowat, V.-C., are, speaking of such conduct as is proved in this case: "Misconduct of a partner does not deprive him of his interest in any property put into the partnership by his co-partner under a partnership agreement, though the misconduct may entitle the latter to dissolution of the partnership, or to have the loss occasioned by such misconduct made good to him. The plaintiff claims that this using by the defendant of partnership property for a business of his own entitled the plaintiff to a receiver, and Harding v. Glover, 18 Ves. 281, which is quite in point, is cited in support of this claim. There a motion was made for a receiver after dissolution of partnership and Lord Eldon observed: 'I have frequently disavowed as a member of this Court that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of duty of a partner or of the contract of partnership. In this instance the defendants have been carrying on trade on their own account with the partnership effects. The order for a receiver was therefore made.'"

Upon all these authorities I am satisfied that if special damage had been shewn I could have charged it against the defendant Macrae. I am satisfied that to some extent at all events the dissolution of the firm was accelerated by the conduct of Macrae, and by the want of confidence which he caused in the minds of the creditors. What damages I should allow is the only difficulty. The firm, by arrangement with the Bank of Commerce, which arrangement was acquiesced in by both parties, was paying 12 per cent. interest per annum. Macrae by his withdrawal of the funds of the firm in all these instances by so much increased the overdraft of the firm and their need to resort to the bank for accommodation. To that extent at least he prejudiced his partner, and he will have to pay 12 per cent., and not 8 per cent., on those withdrawals which are proved against him on an accounting, that is, limiting the 12 per cent. to these particular instances, namely, the 3 accounts named, the cheques issued and not entered, and the goods sold and not entered.

As to the Chatterton transaction I cannot see that any special damage is shewn, nor am I satisfied that anything beyond nominal damages should be allowed for the misconduct in collecting a large sum of over $3,000, and denying it, simply because I cannot say that I can fix with any degree of certainty what those damages should be; but nominal damages should be allowed, and they will be fixed at $10.

Upon the question of costs I am satisfied that the plaintiff was justified in bringing this action when he had ascertained the facts which were proven in evidence, and that no satisfactory liquidation of the estate could have been made otherwise than through the Court. Upon this question the authorities I have already cited bear, and also the case of Bonville v. Bonville, 35 Beav. 129. It is quite clear from these authorities that where misconduct is shewn by one partner, the Court has discretion to allow the costs. There will be costs up to the trial and of the trial to the plaintiff in any event, which will be charged against the share of the defendant, if any balance remains; otherwise it will be a personal charge against him; and the costs of the accounting will be reserved, and there will be an accounting of what sums are owing from the individual partners to the firm. The order of reference as to the accounting and the nature of the accounting may be spoken to again. There will be no need to appoint any receiver in the meantime, because the entire assets are in the hands of trustees under the assignment, but if any occasion should arise for the appointment of a receiver hereafter, a motion may be made for that purpose.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 27TH, 1907.

TRIAL.

NOVAK v. ABRAHAMS.

Covenant—Restraint of Trade—Sale of Goodwill of Business —Informal Document—Admissibility of Parol Evidence to Supplement—Operation of Covenant—Time and Place —Assignment of Covenant — Parties — Injunction — Damages.

Action for damages and an injunction in respect of a breach of covenant contained in an agreement of sale of the

goodwill of a wood business. The statement of claim set out the agreement by which the goodwill of the business was sold, together with the chattels used in the business in Dawson, the payment of the consideration, and a claim for damages. The statement of defence simply denied that the plaintiff had suffered any damage by the breach of the agreement, and denied that the defendant had committed any breach of the agreement, and that he did carry on any business contrary to the agreement, and that any cause of action was disclosed.

F. J. McDougal, for plaintiff.

George Black, for defendant.

CRAIG, J.:—The agreement under which the action was brought is a very crude instrument, apparently drawn up by the parties themselves, who are somewhat illiterate, the plaintiff particularly being a foreigner who speaks very poor English; and the agreement provides that Harry F. Abrahams, the defendant, described as a wood dealer, of the first part, without local description, sells to Joe Novak and Joe Svatonsky, of Dawson, for the consideration of $600, his wood business, including certain chattels, together with goodwill and all benefits, etc., that are to be derived from the aforesaid business, giving for the same consideration the free use and privilege of the office of the vendor, including stable room for horses, etc., in the building at No. 111 Third avenue south, for 6 months, the place of the business not being named any more than as stated—111 Third avenue, not saying where Third avenue is, or in what town; and providing for sharing the cost of lighting and of the telephone office, the vendee agreeing to take what wood the vendor has off his hands at the cost price; and at the end of the instrument the following words: "And it is agreed by the party of the first part that he will not enter in the wood business unless by consent of second party;" signed by all the parties. This instrument is dated 15th September, 1906, and on 29th June, 1907, Svatonsky sold to his partner Novak "all that singular and hereinafter described interest in the property heretofore belonging to the firm of Svatonsky & Novak, general dealers in wood and draying and scavenging business," with the chattels which were originally covered by the sale from Abrahams to the firm. This document contains no assignment of the covenant, if it can be called such, not to enter into business.

On the trial I did not read these documents, which were marked as exhibits, and counsel did not refer to them particularly, and certainly made no reference, either during the progress of the trial or upon argument, to the vagueness of the original document and its uncertainty. I reserved my judgment, and only discovered the vagueness of the document when considering the evidence in preparing my judgment. I then asked counsel to submit authorities upon that question, which they did, but not submitting any on the admissibility of parol evidence to explain. The statement of defence raises no question of vagueness or uncertainty; but it seemed to me that being asked to grant an injunction restraining the vendor from carrying on the business, there should be come reasonable certainty in a covenant and document upon which an injunction could be founded. The evidence at the trial certainly was not directed along these lines, and parol evidence was given sufficient to supply all the defects in the document without objection being raised.

The evidence discloses that Novak remained for the 6 months in the old stand, and afterwards removed from it to a new stand on the same street. After his removal he complains that the defendant Abrahams started and carried on a wood business in opposition to him and was interfering with his customers. Abrahams denies this, but the evidence shews that in the same office, and upon the counter or desk which was used by Abrahams in carrying on the business which he carried on as a scavenger, a book was placed exactly similar to the book which Abrahams himself used to receive orders for scavenging work. It appeared to be the custom that any person wishing wood delivered or scavenging work done should either enter in the book himself when no one was in the office, or that the clerk or person in the office should enter the requirements of the customer. It is proven that persons called there and left orders for wood in this book. Abrahams says that he had nothing whatever to do with these orders, but that one Mahon was carrying on the business. Mahon was a partner of Abrahams and interested with him largely in mining claims on Last Chance creek, where he spent most of his time, being in town occasionally. Mahon swears that he had a clerk in this place for 2 or 3 weeks; but when Mahon came to be examined it was shewn that he had not a cord of wood of his own, but that he was selling wood belonging to one Aunger, and that Aunger was paying

him $1 a cord commission on all sales made. Mahon could not tell how many cords of wood had been sold, or what his commission was, and Aunger was almost equally ignorant. Mahon had no books of entry which he could shew, and Aunger had no books of entry which would shew how the account stood between them. Aunger was a witness who endeavoured as far as he could to aid the defence. He swore that it was through the intervention of Abrahams that he entered into the negotiations with Mahon, and it is quite clear that Abrahams conveyed to Aunger the impression that he thought he was safe in going on with the business. Mahon was a very unsatisfactory witness. Both he and Aunger had to go back in the box the following morning after giving their testimony and make serious corrections in their statements; Mahon particularly, on a point upon which he should have been absolutely informed, finding that he was far astray in his statement, and admitting that he was so informed after he had left the Court by persons who knew the facts, came back and made a correction. But his statements were so ridiculously away from the truth that I am under the impression that he was endeavouring to bolster up his case by rash statements, to put it very mildly. I seldom have had a more unsatisfactory lot of witnesses than those called for the defence in this case, and I am satisfied from the evidence that it was a put-up job between Abrahams and Mahon to carry on this business against the interest of Novak; that Abrahams was well aware of what was going on, and that he acted as intermediary in some sales, I am satisfied; and that the whole thing was a plot between him and Mahon, I am also satisfied. There are no merits in the defence at all. Novak did not shew very much damage, but he shewed a few cases of sales, probably 10 in all, made by Mahon and Aunger, in which I think he (Abrahams) participated.

The first question which I have to consider is how far it is permissible to explain a written document by parol evidence, or to supply the defects in it. It will be seen that the place of residence of Abrahams is wanting in the document, but that the place of residence of the plaintiff is given; the location of the business is not given, it being described simply as "Abrahams's wood business at 111 Third avenue." The covenant restraining does not limit it as to time or place. Can these defects be supplied by parol evidence and

evidence of the actual facts and surrounding circumstances? This evidence has all gone in without objection. It seems to me that the only thing needed to supply are the words "in Dawson" after the description of Abrahams and after the words "his wood business." Upon this matter I would cite Addison on Contracts, 9th ed., pp. 44, 45, and 46. At p. 44 the following words are used: "To enable us to arrive at the real intention of the parties and to make a correct application of the language of the contract to the subject-matter thereof all the surrounding circumstances may be taken into consideration. The law does not deny to the reader the same information that the writer enjoyed. He is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. If an ambiguity arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general text of the instrument when brought into contact with surrounding circumstances, the Court will aid the imperfect expression in favour of the manifest intention, and will draw all such reasonable inferences from the language and general text of the deed as appear to be necessary to give effect to the obvious meaning and to carry into execution any matter or act clearly contemplated."

This contract was drawn in Dawson; both parties resided there; the location named in the document — 111 Third avenue—is in Dawson, and was the place where the vendor carried on his wood business; it was there to be seen and touched by the parties interested, and was certainly the business in contemplation when the document was drawn. It was clearly by mutual mistake that the proper description was omitted; it was in fact a clerical error caused by the illiteracy of the parties, the clear intention of the parties being to describe or to convey the business then being carried on by Abrahams in Dawson at 111 Third avenue. More than that, both parties proceeded on the assumption that Abrahams had sold that particular business, and had covenanted in a binding manner not to infringe or to do any act contrary to his conveyance of the business and the goodwill. Abrahams in his evidence defends the position that he did not do any act in violation of his contract—such a con-

tract as was intended to be drawn up between the parties—and proceeds both in his acts, as he would have the Court believe them, and in his evidence in the Court, upon that assumption. The intention of the parties is absolutely clear; there can be no doubt about it; and it would surely be a miscarriage of justice if a mutual mistake or a clerical error in drawing up the document, where the intention of the parties is so clearly ascertained as in this case, would defeat that intention. I therefore think that the words "in Dawson" should be added wherever necessary to this document, and that the parol evidence was quite admissible, even if it had been objected to at the proper time upon the trial. For further authority upon this point I would refer to Leake on Contracts, pp. 181, 275; Pollock on Contracts, pp. 239, 431, particularly to the words used at p. 238, citing from the case of Jervis v. Berridge, L. R. 3 Ch. 351: "It was held that a document purporting to be a written transfer of a contract for the purchase of lands was not a contract valid and operative between the parties, but omitting designedly or otherwise some particular term which had been verbally agreed upon, but was a mere piece of machinery subsidiary to and for the purposes of the verbal and only real agreement, and since the object of the suit was not to enforce the verbal agreement or any hybrid agreement compounded of the written instrument and some terms omitted therefrom, but only to prevent the defendant from using the written document in a manner inconsistent with the real agreement, there was no difficulty raised by the Statute of Frauds, which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." There is also the case of Shore v. Wilson, 9 Cl. & F. 385, 57 R. R. 2; also Coles v. Hulme, 8 B. & C. 568, 32 R. R. 486. In that case the agreement was a bond for the payment of a sum of money, but in the covenant for payment the penalty was merely described as "7700," without any species of money being mentioned. The Court from the document and from the extrinsic evidence supplied the word "pounds." I would also refer to Goodtitle dem. Radford v. Southern, 14 R. R. 435; also In re Boulter; Ex p. National Provincial Bank of England, 4 Ch. D. 241, and 5 Encyc. of the Laws of England, p. 93.

Being satisfied that the parol evidence was properly admissible, I have therefore to consider how far the restraint is a reasonable one. I have no doubt upon the authorities that this is such a particular restraint of business as the Courts will enforce. The intention of the parties being clear to sell the business in Dawson then being carried on, I think the restraint should go to prevent the vendor from carrying on the same business in Dawson and for the time for which he himself specifies in his agreement he will not enter into the wood business without the consent of the vendee. Such a covenant is to be construed strictly and to the fullest extent against the vendor. The public will not suffer by his restraint, because there are lots of other wood dealers in Dawson, and it was in the contemplation of the parties that he should not enter into the wood business again so long as Novak and Svatonsky carried it on; and I think that if the words which I have mentioned had been used in the document it would be a reasonable restraint, that is, that he should not enter into the wood business again in Dawson so long as the vendees carried on business in Dawson. On this point I would cite the authorities of Cutwell v. Lye, 17 Ves. 335, 11 R. R., and the leading case of Nordenfeldt v. Maxim Nordenfeldt Co., [1893] 1 Ch. 630, [1894] A. C. 535.

Another question arises in this case, that is, the want of an assignment of the covenant as between Svatonsky and Novak. Svatonsky does sell to Novak "all the hereinafter described interest in the property heretofore belonging to the firm of Svatonsky & Novak, general dealers in wood, draying, and scavenging," but by particular description only describes the chattels used in carrying on the business. They were partners in the business, and Svatonsky went out of the business, leaving his partner to carry it on. I think, under the law of partnership, that the goodwill passed with the business to the remaining partner, but, if any doubt should arise upon this matter, I think I have power under our Rules to add Svatonsky as a party plaintiff in the action. He has filed a consent to be so added, and will now be added as a party plaintiff.

There will be judgment for the plaintiff for $50 damages and an injunction restraining Abrahams (the defendant) from carrying on the wood business in Dawson so long as Novak carries on a similar business here, with the costs of the action.

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MANITOBA.

DECEMBER 6TH, 1907.

COURT OF APPEAL.

TELLIER v. SCHILEMANS.

Will—Undue Influence—Fraud—Want of Testamentary Capacity—Action to Set aside—Evidence—Bill of Sale—Conveyances of Land—Transfer of Business—Absence of Consideration.

Appeal by defendants from judgment of RICHARDS, J.A., 5 W. L. R. 536.

A. Haggart, K.C., and H. W. Whitla, for defendants.

J. E. O'Connor and H. P. Blackwood, for plaintiff.

The judgment of the Court (HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.), was delivered by

PHIPPEN, J.A.:—The three grounds upon some one of which the plaintiff argues the will should be set aside are: (1) that the deceased at the time of execution was non compos mentis; (2) that the will by reason of fraud or error does not represent D'Aoust's testamentary intention; and (3) undue influence.

The deceased was extremely weak physically and consequently incapable of sustained mental effort, but it does not follow that he was incompetent to direct and execute a simple will. Counsel for the plaintiff were unable to suggest any direct evidence of mental incapacity. On the contrary,

the attending physician says the testator's mind was not affected; the solicitor who received instructions for and prepared the will, and who saw him subsequently in connection with other business, says he discussed his affairs very intelligently. A few days later, at a time when his physical condition had undergone little change, he consulted Mr. Andrews, a well-known solicitor, as to the validity of certain documents he had recently executed. Mr. Andrews, who had known D'Aoust for many years, states that, while he was physically weak, his mentality was unimpaired. Although the testator's daughter, the plaintiff, conversed with her father several hours a day during his last illness, she does not suggest any mental change. On these facts, I must hold that it has not been established that the deceased lacked testamentary capacity.

The second contention of the plaintiff is based on statements of the deceased inconsistent with his knowledge of having recently executed the will produced. The Rev. Father Portelance, a witness called by the defence, stated on cross-examination that a few hours after the deceased was taken ill, and presumably almost immediately after execution of the will in question, and on two subsequent occasions, D'Aoust informed him that he had made his will, but stated terms differing entirely from those of the will produced. The statement was first made when D'Aoust expected early death and just after he had confessed to Father Portelance. It is difficult to imagine that under these conditions he spoke other than he believed. The plaintiff also says he told her of his will in terms very similar to those mentioned to the last witness.

I am unable to reconcile this evidence with the other facts of the case, but, in view of Mr. Bernier's evidence and the subsequent conveyances inconsistent with the intent of the will produced, I do not think I would be justified on this ground in setting the will aside as executed in fraud or mistake.

Was there undue influence? Normally the onus is on the plaintiff. What must he establish?

"In order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, it must be an influence exercised either by coercion or fraud. . . . But in order to set aside the will of a person of sound mind, it is not sufficient to shew that the circum-

stances attending its execution are consistent with the hypothesis of having been obtained by undue influence. It must be clearly shewn that they are inconsistent with a contrary hypothesis:" Cranworth, L.C., in Boyse v. Rossborough, 6 H. L. Cas. 49, 51.

"I take the law to be that mere influence exercised by a wife or other person over the mind of a testator is not of itself sufficient to invalidate a will, that it must amount to a control over his mind, subjecting his mental will to the desire of another; so that the document executed as his will is not in reality the expression of his will, but that of another:" Waterhouse v. Lee, 10 Gr. 190.

"It is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will such as it is has been produced:" Baudains v. Richardson, [1906] A. C. 185, approving Wingrove v. Wingrove, 11 P. D. 81.

During the argument of the appeal the Court pressed Mr. O'Connor for some evidence of improper influence, but, apart from an untrue statement by the defendant Schilemans to the deceased during his last illness, to the effect that the plaintiff did not want to visit him, Mr. O'Connor was unable to refer to any direct evidence, and was compelled to rely on the general suspicions to be drawn from the surrounding circumstances.

Whether correctly or not, D'Aoust believed his wife had left him to lead an immoral life. A few days before his last illness he received a letter from a friend in Quebec stating that his wife was coming to Winnipeg to cause trouble, and blaming the plaintiff for encouraging her. It is true the plaintiff says he brought the letter to her for an explanation and accepted her denial. His attitude to the plaintiff commencing a day or two after he made his will, and lasting to the time of his death, would indicate that he did not bear her any deep resentment.

Almost immediately after the receipt of this letter, D'Aoust's wife arrived in Winnipeg. She went to the plaintiff's house, where she remained while in the city. On her behalf the plaintiff consulted a lawyer as to the intended alimony action, and on a second occasion accompanied her

to the same lawyer to act as her interpreter. How much of this D'Aoust knew we are unable to guess.

On 17th April D'Aoust received a letter threatening action for alimony; later he had the attack of heart failure, and while ill he told Mrs. Schilemans the letter was its cause. On the same day he made his will. He may then have blamed his daughter for his trouble, and believed that the only way to keep his property from his wife was to keep it from his daughter. That he was determined the wife should have nothing is shewn by his conveying everything to Mrs. Schilemans, and later consulting Mr. Andrews to ascertain if the transfers would stand as against his wife.

Taking this view of the facts, it is impossible to say that the circumstances surrounding the making of the will are consistent only with undue influence. The direct evidence is insufficient, and the will cannot be set aside on this ground.

So as to the subsequent conveyances, I can see no justification for vacating them at the action of a volunteer. I accept the trial Judge's finding that they were made without consideration, but they were not induced by fraud or coercion. They were executed to put the property out of Mrs. D'Aoust's reach. The deceased may have been badly advised, he may have been needlessly alarmed by the threatened action, but on neither of these grounds can the transaction be voided by the daughter. That he did intend to do what he did is clearly shewn by his consultation with Mr. Andrews.

Lastly Mr. O'Connor adduces the doctrine laid down by the Court of Appeal in England in Tyrrell v. Painton, [1894] P. 151, where it is stated: "Wherever a will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument."

I have read all the cases cited by Mr. O'Connor, but am unable to find the present facts within any of the principles there laid down. When D'Aoust was taken ill, a lawyer was sent for to prepare his will. The solicitor selected was a man of good standing, a personal friend of the testator, and one who had previously transacted legal business on his behalf. D'Aoust does not appear to have had

what might be termed a regular solicitor. Mr. Bernier seems to have taken his instructions in the usual way, and, having prepared the will and had it executed, to have taken it with him and produced it to Mr. Andrews with the subsequent transfers when counsel's opinion was sought for and Mr. D'Aoust was present. I am unable to find that merely because the beneficiary was in the same room when instructions were taken, these facts raise a suspicion making the will prima facie void, or throwing the onus of explanation upon the defendant.

I think the appeal must be allowed, and the judgment of the trial Judge vacated and the will admitted to probate, all with costs against the plaintiff, both of the appeal and below.

MANITOBA.

DECEMBER 13TH, 1907.

COURT OF APPEAL.

RE MORRIS PROVINCIAL ELECTION.

Parliamentary Elections — Controverted Election Petition— Preliminary Objections — Disposal of — Status of Petitioners—Time Limit for Trial—Incorporation by Reference of Provision of Dominion Act—Rules of Court— Practice or Procedure.

Two appeals by the respondent to a controverted election petition from orders of MATHERS, J.

After the judgment given by MATHERS, J., on 18th October, 1907, 6 W. L. R. 742, an order was taken out that the petitioners might, within 3 weeks, or such further time as might, upon special appointment, be allowed, give the necessary evidence of the petitioners' qualifications under the Manitoba Elections Act, R. S. M. 1902 ch. 52, sec. 184, upon payment or tender to the respondent of the costs of the additional attendances so rendered necessary, fixed at $25.

No order was made as to any of the preliminary objections, all of which stood over to be further dealt with.

The respondent appealed from that order, and asked that his objection as to the status of the petitioners should be allowed and the petition dismissed with costs, including the costs of the preliminary objections and of the appeal, upon the ground that MATHERS, J., having held that the petitioners had not proved their status, and the petitioners having closed their case, he had no power to re-open the trial upon the preliminary objections and permit them to adduce further evidence.

A further appeal was entered against the order of MATHERS, J., of 29th November, 1907, ante 132, dismissing the application of the respondent for an order dismissing the petition, and directing that no further proceedings should be had or taken thereon.

The two appeals came on for argument together, before HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. J. Andrews, for the respondent.

J. E. O'Connor and H. P. Blackwood, for the petitioners.

HOWELL, C.J.A.:—As to the first appeal. If the wide language used in the Controverted Elections Act, R. S. M. 1902 ch. 34, does not permit the Judge to dispose of the preliminary objections according to the ordinary rules of practice in civil proceedings, I think that all doubts on that subject are disposed of by secs. 92 and 93 of the King's Bench Act. The first appeal is dismissed with costs.

As to the second appeal. It is argued that because of sec. 13 of the Manitoba Controverted Elections Act, the provisions of secs. 39 and 40 of the Dominion Controverted Elections Act are, until this Court makes rules to the contrary under that section, to be read as a part of the former Act. This Court under the Dominion Act may make rules as to practice and procedure, but of course there would be no power by rule to vary or alter the provisions of secs. 39 and 40. If the argument is sound, then this Court would by rules have wider power under the local Act than under the Dominion statute; in other words, the local legislature delegated to the Judges, by inference, the power to fix by rules a period within which the petition shall be brought on for trial, and in default to be dismissed.

The Dominion statute requires the petition, with notice thereof and of the security, and a copy of the deposit receipt, to be served on the respondent, but the local Act only requires the service of the petition and notice thereof; and Mr. Andrews on the argument admitted that, if his argument was sound, all the requirements as to service in the Dominion Act, unless rules were made to the contrary, were to be followed in service of petitions under the Manitoba statute. The Dominion Act also requires an affidavit of bona fides to be filed with the petition; by the same reasoning this requirement must also be observed in the filing of petitions under the local Act.

The Manitoba Act first appeared in the statutes more than 30 years ago, copied largely from the Dominion Acts then in force, which latter then contained the original of secs. 39 and 40. Since then the Federal Act has been changed in some respects, and the Manitoba statute has also been changed to follow some of these amendments, but the legislature has not, through all the amendments and consolidations, seen fit to put a time limit within which a petition must be tried.

The Manitoba statute is a complete code of procedure in itself, and an examination of similar Acts in other provinces and in England, leads me to think that general public policy does not require such limitation.

The trial of election petitions involves the consideration of the common law of Parliament and of the consideration and trial of corrupt practices as well as the duties of returning officers, all of which has been fairly well established as a practice and procedure by committees of the House of Commons of England and of Canada, and it certainly was expedient to have these principles and practices introduced into our local statute, so that the English decisions would be applicable here, but I can see no necessity for fixing a definite period within which the petition must be tried. For more than 30 years the local Act has been in existence, and many petitions have been filed under it, and I think I can say that during 28 years of that time it has not been the practice to do otherwise than follow the procedure laid down by that Act and by rules, and it has not been considered necessary to follow the requirements of the Dominion Act.

In my view, sec. 13 introduces into the practice the Canadian and English rules, and the principles upon which election trials are conducted and decided, in Canada and England, and particularly those principles and the practice of election committees, which were well established before the Mother of Parliaments handed over this work to courts of justice.

During the ages courts of justice have developed methods of procedure and principles by which civil and criminal cases are tried and decided, and when this new jurisdiction of deciding who were to be members of the legislature was committed to Courts, it was deemed expedient that the great principles born of experience and knowledge of humanity and of representative government by which the Imperial House of Commons was purged of members improperly returned should, except as varied by our local Act, be the guide to courts of justice in such trials, without which Courts would be groping for some principle to guide them to a proper conclusion.

The second appeal should be dismissed with costs.

PERDUE, J.A.:—Under sec. 10 of the Manitoba Controverted Elections Act the Judges of the Court of King's Bench are empowered to make rules regulating the practice and procedure with respect to election petitions under the Act. No such rules have been made. Under sec. 13 of the same Act, until such rules shall have been made, the "principles, practice, and rules" then in force by which election petitions touching the election of members of the House of Commons of Canada are governed, shall be observed, so far as consistently with the Act they may be so observed.

It is contended on behalf of the respondent that, in virtue of the above, the provision contained in sec. 39 of the Dominion Controverted Elections Act, that the trial of an election petition shall be commenced within 6 months from the time when such petition has been presented, applies to election petitions filed under the Manitoba Act as part of the practice relating to petitions under the Dominion Act, and so introduced under sec. 13 of the Manitoba Act.

After a careful consideration of the two statutes, I cannot arrive at the conclusion that the above provision in

sec. 39 is a mere matter of practice. It is a limit that is placed upon the life of the petition in case it is not brought to trial within the prescribed period, provided that no order has been obtained extending the time. It was deemed to be of such importance that a special statutory provision was passed introducing it into the Dominion Act. The Judges of the Courts in the several provinces were not authorized by the Act to pass a rule limiting the time when petitions should be brought on for trial. If they had been given such a power, a different period might have been fixed in each province, and it was, no doubt, deemed to be desirable that there should be uniformity in such a matter. The 6 months' limit was therefore made a statutory provision, and the power to deal with it was withheld from the Judges, although they were given power to make rules regulating the practice and procedure respecting election petitions. It is not, therefore, merely a matter of practice under the Dominion Act, and it could not be affected by any rule to be passed under that Act. Section 13 of the Manitoba Act introduces the practice and rules governing election petitions presented under the Dominion Act, until rules should have been made under the Manitoba Act. In other words, the rules of practice and procedure passed under the Dominion Act shall be observed in proceedings under the Manitoba Act, provided that they are not inconsistent with the latter, and that no rules covering the same matters have been passed under its provisions.

The above sec. 39 would not, in several respects, be applicable to the Manitoba Act, by reason of other provisions in the latter differing materially from the Dominion Act. My brother Phippen will deal more fully with these in a judgment which I have had the advantage of perusing.

It was strongly urged by Mr. Andrews that the limiting of the time within which a petition must be brought to trial was merely a matter of practice, and that the Judges might, under the Manitoba Act, pass a rule similar to that contained in sec. 39 of the Dominion Act. He cited as authority the fact that the Judges in England had by a rule of Court, passed under 11 Geo. IV. and 1 Wm. IV. ch. 70, sec. 11, compelled a plaintiff to file his declaration within a year, or else be out of Court. This latter statute enabled the Judges of the several Courts together to make rules regulating the proceedings of the Courts. From this it

was argued that the imposition of a time limit for doing a thing is a mere matter of practice.

It is obvious, however, that a special statutory proceeding in the nature of an election petition differs widely from a suit in an English superior Court. Suitors in such a Court were in former days deemed to be present in Court when each step was taken. The pleadings were at first ore tenus. When the defendant appeared, he might originally demand that the plaintiff proceed with his declaration at once, and if the plaintiff was not present there might be a nonsuit. The parties being present in the Court, they were under the jurisdiction of the Court, and subject to such terms and conditions as it might impose as to the manner in which the proceedings were to be carried out, and subject also to the penalty it might inflict for a default. In this manner a practice grew up and rules were made in the several Courts limiting the time for declaring, for pleading, and for other proceedings, and declaring the consequences of default, these rules varying considerably in the several Courts. See Tidd's Practice, 9th ed., p. 420. The above mentioned statute was passed in order that rules might be framed making the practice uniform in the Courts.

The Manitoba Controverted Elections Act contains provisions for the presentation of election petitions, when they are to be presented, how and when they shall be served, the filing of preliminary objections, the hearing of these, the manner of trial, and other important matters of procedure. It somewhat closely follows the Dominion Act, adopting the provisions of the latter, or making such changes or additions as were deemed advisable. But, significantly enough, it leaves out the provision as to the 6 months' time limit contained in sec. 39 of the Dominion Act. I think this was done advisedly, and that it was not the intention to introduce it into the Manitoba Act. In my opinion, the provision in question is not a part of the practice introduced by sec. 13 of that Act.

I think the appeal should be dismissed with costs to the petitioner in any event of the cause.

PHIPPEN, J.A.:—The appellant contends that no rules having been formulated pursuant to sec. 13 of the Manitoba Controverted Elections Act, R. S. M. 1902 ch. 34, the

practice under sec. 39 of the Dominion Controverted Elections Act, R. S. C. ch. 7, has been introduced into Manitoba.

Section 39 of the Dominion Act is in part as follows: "The trial of every election petition shall be commenced within 6 months from the time when such petition has been presented. . . . But, if it appears to the Court that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament, if the respondent is a member; and in the computation of any time allowed for any proceeding in respect of any such trial as aforesaid the time occupied by such session of Parliament shall not be included."

Section 13 of the Manitoba statute is as follows: "Until rules have been made in pursuance of this Act, and in all cases unprovided for by such rules when made, the principles, practice, and rules then in force by which election petitions touching the election of members of the House of Commons of Canada are governed shall be observed, so far as consistently with this Act they may be so observed."

It is apparent that the exact practice created by sec. 39 is not applicable to Manitoba. Under the Dominion Act trials must be commenced by a certain date, which depends, in some cases at least, on conditions which do not prevail in this province. By sec. 44 of the Manitoba statute, no election petition shall be tried during any session of the Legislative Assembly, nor during certain fixed periods preceding and following such session. The appellant's counsel does not contend that the Dominion practice should be introduced in its entirety, but should be altered so as to compel the trial to be started within the 6 months referred to in the Dominion Act, together with, in all cases, such additional time as may be taken up by sittings of the legislature and by the periods preceding and following such sittings, during which no trial shall be begun as provided for in sec. 44 of the Manitoba Act.

Unless by virtue of rules formulated under sec. 13, I do not see how the Court can, under the authority of that section, import, not the Dominion practice or a portion of the Dominion practice, but something so essentially dif-

ferent as that suggested by the appellant's counsel. Under sec. 13, in so far as applicable, the Court, apart from rules, might at most eliminate some parts of the practice applicable to the Dominion but not to Manitoba, if such could be done, without substantially altering the practice itself. That, however, is not the case, and I have concluded that even assuming sec. 39 to be practice, which I doubt, its terms are not applicable to Manitoba, and the suggested alterations necessary to reconcile it with our Act cannot be introduced as part of the Dominion practice, but, if at all, only by the promulgation of local rules.

I feel the more free to adopt this construction, as a comparison of the two Acts strongly indicates a deliberate intent to leave out the restricting provision. Sections which in the Dominion Act surround sec. 39, and which plainly relate to practice, have been copied almost verbatim into the Manitoba statute, while sec. 39 was omitted. Yet, according to the appellant's argument, the legislature did this, intending, at the same time, to introduce sec. 39, not in its entirety, but with alterations and additions, and this by virtue of the very general language of sec. 13.

Apart from this, I have grave doubt if the provisions of sec. 39 (Dominion) are covered by sec. 13 (Manitoba). Section 39 would appear to have been enacted to avoid the public inconvenience occasioned by untried election petitions being left pending against members of Parliament for an indefinite time, and as a matter of public policy rather than as a practice or proceeding of the Court: Re Glengarry Election Case, 14 S. C. R. 477. If the section is primarily one of public policy, although incidentally it involves practice, I have serious doubts if we could hold it to be introduced into this province by sec. 13. Having formed the opinion expressed on the first point, however, I dismiss the appeal on that ground with costs.

I have not considered the objection raised by Mr. O'Connor that there is no appeal from the order of the Judge in this matter.

RICHARDS, J.A., concurred.

MANITOBA.

DECEMBER 13TH, 1907.

COURT OF APPEAL.

REX v. PICARD.

Criminal Law—Lottery—Foreign Bond—Evidence to Justify Conviction.

Reserved case. The following case was reserved and stated under sec. 1014 of the Criminal Code by CUMBERLAND, Co.C.J.:—

On 25th November, 1907, Edmond Picard was tried before me in the County Court Judge's Criminal Court for the Western Judicial District of Manitoba, on an indictment containing two counts as follows:—

1. That he on Monday 30th September, 1907, at the city of Brandon, in the said Western Judicial District, unlawfully did sell and barter a certain card and ticket for advancing, lending, giving, selling, and otherwise disposing of certain property, to wit, money, by lot, tickets, and mode of chance, to one Joseph Cook.

2. And the said Edmond Picard stands further charged that he, on Saturday 28th September, 1907, at the city of Brandon, in the said Western Judicial District, unlawfully did sell and barter a certain card and ticket for advancing, lending, giving, selling, and otherwise disposing of certain property, to wit, money, by lots, tickets, and mode of chance, to one William Gordon Lane.

The following facts were proven by the evidence:—

The accused Picard was an agent of the Provident Financial Association Limited, a company incorporated by an Act of the Parliament of Canada, 5 Edw. VII. ch. 151.

On 28th September, 1907, Picard sold to one William Gordon Lane, at Brandon, a Bon Panama for $48, payable as follows: $2 at the time of the sale and $2 monthly for 23 months.

He gave Lane a receipt for the $2, and procured to be sent to him within a few days thereafter by the said company a paper called a "contract of sale on credit and repre-

sentative title of Bon Panama." The Bon Panama was to be delivered to Lane upon his paying the balance of the purchase price, but by the terms of the purchase he was in the meantime "entitled to all privileges and rights attached to the Bon Panama" as if it had been paid in full. The Bon Panama was represented as being "redeemable by drawings exclusively with lots until 1913 and a minimum of 400 francs, or with lots until 1988," the drawings referred to being held in Paris, France.

At these drawings (particulars of which are given on the back of the representative title of Bon Panama already referred to) money prizes varying in amount from $96,500 to $193 are, it is represented, given away by lot, and Lane, as a purchaser of Bon Panama, was to be eligible to participate in the drawings with a chance of winning one of the prizes.

On 30th September, 1907, Picard sold another Bon Panama to Joseph George Cook at Brandon, and the nature of the purchase in that case and the rights and privileges accruing to the purchaser were in all material respects the same as those in the case of Lane.

Picard in canvassing for purchasers for Bon Panama held out as an inducement the chance that a purchaser had of winning a prize, and the belief that there was such a chance influenced Lane and Cook to buy.

The Bon Panama appears to be a well known bond in France, is listed on the Paris Bourse, and sold by the Credit Lyonnais, the Bank of France, and other banks in that country.

A newspaper called "La Bourse pour Tous," proved by evidence of Picard to be a copy of a paper published in Paris, contained, among references to other stocks and bonds, the item "Panama Bons à lots 107."

Copies of two French statutes passed in the years 1888 and 1889 were admitted in evidence by consent.

I found the accused guilty on each count of the indictment.

A the request of cousel for the accused I reserved a case for the opinion of the Court of Appeal.

The question to be considered is:

Was the accused, under the circumstances, properly convicted of the offences charged in the indictment?

J. P. Curran, for accused.

G. Patterson, for the Crown, not called on.

THE COURT (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), held that the question submitted should be answered in the affirmative.

Conviction upheld.

MANITOBA.

MATHERS, J. DECEMBER 30TH, 1907.

TRIAL.

GILLIES v. GIBSON.

Mechanics' Liens—Work Done on Building — Authority of Husband of Owner—Work Reasonably Well Done—Priorities—Mortgagees—Other Lien Holders—Evidence.

Action to enforce a mechanic's lien.

C. L. St. John, for plaintiff.

A. E. Bowles, for defendants.

MATHERS, J.:—This is an action to enforce a mechanic's lien against lots 25 to 28 both inclusive, D. G. S. 67-8 St. John, the title to which was in the defendant Florence E. Gibson. The work done was the construction of a stone foundation on each of those lots under a contract made by the plaintiffs in writing with J. P. Gibson, the husband of the defendant Gibson, for the building of 5 stone foundations and 5 single flue chimneys upon the lots mentioned and lot 29. Owing to a defective title to the latter lot, the work upon it was by consent not proceeded with. The contract was let on 2nd November, 1906, and early in December the plaintiffs had completed the 4 foundations with

the exception of the beam filling and a small portion of the pointing. The beam filling could not be done until the joists were laid, the laying of which was no part of the plaintiffs' contract, but, so far as appears, all carpenter work was to be done by the owner. The chimneys could not be built until the frame work of the houses was up, and the pointing could not be completed until the beam filling was done. The plaintiffs spoke to J. P. Gibson about the laying of the joists in order that they might complete the foundations, and were informed by him that he had some difficulty about procuring this material, and it was then agreed that as soon as the joists were in he would notify the plaintiff Gillies, who promised to forthwith thereafter proceed to do the beam filling.

The plaintiffs heard nothing more from either the defendants or J. P. Gibson, and in March one of them went to the work, and found that the joists were on, that the beam filling had been done, and 3 of the chimneys were erected and about half of the fourth. J. P. Gibson was asked for an explanation, and he said he found he could do the work more cheaply himself. On 6th April the plaintiff Gillies with a workman went to complete the pointing, and was then told that the buildings had been turned over to the defendants McClelland and Powers, and that they were completing them, and Gillies was asked not to do any work there but to go and see McClelland. He, however, went on and completed the pointing.

The plaintiffs do not claim priority over the defendant loan company, except as to the amount by which the land has been increased in value by their work; but no evidence whatever was given upon which it would be possible to base a finding as to what that increased value was. As to the loan company, therefore, the plaintiffs' action must fail.

The defendants Powers and McClelland objected that the plaintiffs had made default in the completion of their contract, and also that the work done was defective. I can see no evidence whatever of any default on the part of the plaintiffs for which they can be held responsible. The contract provides for no standard of work to be done. That means, I take it, that the work must be done reasonably well, and I find that this work was reasonably well done.

The chief defence relied upon by the defendants Powers and McClelland was that J. P. Gibson was not the agent of the defendant Florence Emily Gibson, his wife, and, if he were not so, then I think the plaintiffs must fail. The defendant Gibson put in no defence, and judgment by default has been entered against her. The plaintiffs had no communication directly with Mrs. Gibson, and they believed, I think, that J. P. Gibson was the owner of the property. In the Ontario Mechanics' Lien Act there is a provision that where a work or service is done or materials furnished upon or in respect of the lands of any married woman with the privity and consent of her husband, it shall be conclusively presumed that he was acting as her agent for the purposes of that Act. Unfortunately the Manitoba Mechanics' and Wage Earners' Lien Act does not contain this provision. At the time this Act was before the legislature, I suggested to the then Attorney-General the desirability of having it inserted, but he declined on the ground that there was a presumption under such circumstances that the husband was acting as the wife's agent. I thought then, and I still think, that there is no such presumption, and that the fact of the husband's agency must be established as any other fact. Whether or not in this particular case the husband was or was not the agent depends upon what can properly be inferred from the circumstances. On 12th November, 1906, the defendant Florence Emily Gibson entered into what is called a building loan agreement with the loan company in respect of each of the lots in question. Each of these agreements provides, amongst other things, that she will forthwith proceed to erect a frame modern dwelling 22 x 30, one and a half storeys, with stone foundation, on the lot named. These agreements were signed by the defendant Gibson in her own hand and witnessed by J. P. Gibson. On 7th November 4 several applications were made for loans upon the several lots named. These applications were each signed Florence E. Gibson, per J. P. Gibson, and were acted upon by the defendant Gibson, and the loans made pursuant thereto recognized by her. It appears, therefore, that she did intend to erect buildings on each of those lots, and that there were to be stone foundations built upon each lot. It appears that the contract for plumbing in these buildings was let to the defendant Powers,

and that the negotiations for this contract were conducted by J. P. Gibson. While the plaintiffs were constructing these foundations, the defendant Gibson and her husband drove to where the work was going on, and he got out of the conveyance and went to and discussed some matters relating to the foundations with the plaintiffs, who were then at work upon the foundations. She remained in the rig, but in full view of the work. It appears that during the progress of the work the defendant and her husband were frequently in the loan company's office together, giving directions as to the buildings. From all these circumstances I think the only fair inference to draw is that J. P. Gibson was authorized by his wife to contract for the erection of these foundations.

It was attempted to be shewn by the defendants that Mrs. Gibson had given instructions that her husband was not to be recognized, but the evidence shews that she did recognize him and that he did take part in directing the erection of these buildings. Under these circumstances, I am disposed to pay very little attention to the evidence of the defence on this point.

It was not disputed that if the agency of the husband for the wife was established, the plaintiffs were entitled to recover in priority to the defendants McClelland and Powers. The total contract was $1,290, but that was for 5 houses. The work was only done in respect of 4, so the total contract price in respect of the 4 would be $1,032. For the work that the plaintiffs did not do they have made an allowance of $120, and claim to recover $912. The plaintiffs had a right to go on and complete the whole work. The defendants had no right to take it out of their hands and complete it without their consent. The plaintiffs have sworn that $120 was a fair allowance for the work that remained to be done. It is doubtful whether, under the circumstances, they would not be entitled to recover the whole contract price, but, as they have chosen to make an allowance of $120, there will be the usual judgment for a lien in their favour for $912 and costs. As against the loan company, the action must be dismissed with costs.

MANITOBA.

MATHERS, J. DECEMBER 30TH, 1907.

TRIAL.

BROCK v. ROYAL LUMBER CO.

Contract—Breach—Damages—Supply of Coal—Construction of Clause of Contract—Penalty or Liquidated Damages—Failure to Prove Actual Damage.

In July, 1906, the plaintiffs entered into an agreement with the defendants to sell to the defendants 1,500 tons of American anthracite coal, at the price of $6.70 per ton f.o.b. cars at the town of Fort William or Port Arthur, in the province of Ontario. The purchasers agreed to accept delivery of the full amount of 1,500 tons within the period of 6 months after 1st October, 1906; they were not obliged to order any given quantity in any one particular month, but were at liberty to order the full amount in such lesser amounts and at such times within the 6 months as they might deem best. The purchasers further agreed to pay for each of the lesser amounts so ordered at the time each such order was given, and for the whole 1,500 tons on or before 1st April, 1907.

In addition to above, the agreement contained the following provision: "And for the insuring of the more effectual performance of this agreement, the purchasers further agree to pay to the vendors on 1st April, 1907, the sum of $1 as a penalty by way of liquidated damages for every ton of the said full amount of 1,500 tons not ordered and paid for by them on 1st April, 1907." The plaintiffs brought their action under this clause for the sum of $467, alleging that the defendants had failed to order and pay for 467 tons of coal within the period limited by the contract.

MATHERS, J.:—During the winter of 1906-7 there was a great demand for fuel, and the supply of several of the fuel dealers of the city ran short. The plaintiffs themselves refused to sell coal in more than quarter-ton lots, and there appears to have been great difficulty in procuring the rail-

ways to bring the coal to Winnipeg from Port Arthur and Fort William as fast as it was demanded. The demands continued much longer into the spring than is usually the case, and there was a sale for coal up to the month of July. As a matter of fact, the defendants only received from the plaintiffs 933 tons, but before the season was ended the plaintiffs had sold their whole supply of coal at a profit, and I infer that they sold it at a larger profit than they would have received had they supplied the defendants with the whole 1,500 tons.

Amongst other grounds of defence, the defendants contend that the $1 per ton mentioned in the clause in the agreement above quoted is a penalty and not liquidated damages, and that they are therefore entitled to relief from it under the statute 8 & 9 Wm. III. ch. 11. The draftsman does not appear to have had in his mind when drawing this clause the difference between a penalty and liquidated damages. The expression used is "as a penalty by way of liquidated damages." It is somewhat difficult to say what the words "as a penalty by way of liquidated damages" mean, but, as the amount is said to be payable "as a penalty," I think I must assume that that is what the parties intended it to be.

No general rule can be laid down for determining whether or not any sum payable on breach of contract is to be construed as a penalty or as liquidated damages, but several subsidiary rules which aid in determining the question can be gathered from the authorities. This clause starts out by saying "for the more effectual performance of this agreement," and in Hudson on Building Contracts, at p. 519, it is stated that "if the intention of the parties to the contract was to secure the performance of the contract by the imposition of a fine or penalty, then the sum is a penalty." Where doubtful the Courts will generally construe the sum payable as a penalty: Joyce on Damages, sec. 1298; Mayne on Damages, p. 156; 19 Am. & Eng. Encyc. of Law, p. 397.

The use of the word "penalty" will generally be construed as shewing that the parties intended the sum mentioned to be so considered: Joyce on Damages, sec. 1300; 13 Cyc. 95; Mayne on Damages, p. 155.

When the parties themselves call the sum made payable a penalty, the onus lies upon those who seek to shew that

it is to be payable as liquidated damages: per Lord Esher, M.R., in Wilson v. Love, [1896] 1 Q. B. at p. 630; and to the same effect, A. L. Smith, L.J., at p. 632.

The test appears to be whether the loss which will accrue to the plaintiffs from an infringement of the contract can, or cannot, be accurately or reasonably calculated in money antecedently to the breach. If it can be so calculated, then the fixing of a larger sum of money shall be treated as a penalty: Mayne on Damages, p. 158.

As a general rule, independently of any other controlling factor, though a sum may be designated as liquidated damages, if it appears that the actual damages from a breach of the contract can be computed, then such sum will be construed as a penalty, and actual damage only can be recovered: Joyce on Damages, sec. 1301; 19 Am. & Eng. Encyc. of Law, pp. 402, 407; 13 Cyc. 93.

Where the sum is made payable to secure several stipulations the damages for the breach of which must be substantially different, the sum is prima facie a penalty: Kemble v. Farran, 6 Bing. 141; Wilson v. Love, [1896] 1 Q. B. 626.

It is very clear that the damages for the breach of this contract were easily and accurately ascertainable. Coal is a staple commodity the selling price of which is largely fixed and is not generally liable to fluctuation, and for which in Winnipeg there is a ready market.

The only circumstance surrounding the whole transaction that would give any colour to the fact that the parties intended it as liquidated damages is the reference to liquidated damages in the clause mentioned. But, even if it was stated to have been as liquidated damages, the authorities shew that that is not conclusive, but would only raise a presumption that the parties so intended it—a presumption which might be rebutted by the surrounding circumstances.

I have not been able to find any case where in an agreement for the sale of a staple commodity for the breach of which the damages can be accurately and readily ascertained, the sum mentioned as payable upon such breach has been construed as liquidated damages and not as a penalty, no matter by what name it is designated, unless by the terms of the contract itself it is absolutely clear that liquidated damages were intended. After considering the whole agreement and all the circumstances surrounding it, I can arrive at no other conclusion than that the parties meant by this

agreement what they have said, namely, that this sum was a penalty to secure performance of the agreement, and that the plaintiffs would be entitled to recover only the damages they have actually sustained if the defendants were guilty of a breach, a fact upon which I do not find.

No attempt was made by the plaintiffs to prove any damage, and I am satisfied from the evidence that the plaintiffs sustained none, but, on the contrary, made larger profits than they would have made had the defendants received all the coal bargained for.

The defendants allege that after the agreement referred to was made, a variation of its terms was verbally agreed to by the parties, by which the plaintiffs waived their right to prepayment with each order for coal, and agreed to accept payment as each car load was placed on the defendants' siding at Winnipeg. I find as a fact that such variation was agreed to and acted upon up to 29th January. Upon all other facts the Court of Appeal, should this case go there, will have as good an opportunity, if not a better, of arriving at a conclusion as I have.

The action will be dismissed with costs. The counterclaim will also be dismissed with costs.

BRITISH COLUMBIA.

WILSON, Co.C.J. DECEMBER, 1907.

CHAMBERS.

RE BELL LIQUOR APPEAL.

Liquor License Act—Hotel License granted by Commissioners —Number of Licenses—Householders—Onus of Proof—Interpretation of "Population Actually Resident"—Floating Population—Signatures to Petition.

Appeal by Labelle from decision of license commissioners granting a retail liquor license to one Hugh Bell.

A. I. Fisher, for appellant.

Sherwood Herchmer, for respondent.

WILSON, Co.C.J.:—In this matter I have come to the conclusion that the decision of the license commissioners shall be affirmed.

Two of the main objections furnished to the granting of the license were: first, that there are 3 licenses already at Hosmer, and the population is not sufficient to warrant the granting of an additional license, following the amendment of 1906; and, second, that the petition for the license was not sufficiently signed.

In dealing with the issues I must to an extent decide them together. At and around Hosmer there is a large population of the come to-day and go to-morrow variety. Counting the entire population within a 3-mile radius from Hosmer, it seems to me there is now a population of 1,500, and the only doubt in my mind was whether or not this is what might be called a floating population, and come within the Act as being a population actually resident. I think that where a man enters into the employment of another person for an indefinite period he thereby becomes part of the population actually resident, and the presumption is that he is such when once he enters on the employment until the contrary is shewn to me. In other words, the presumption is in favour of his being actually resident once he enters such employment, and that is a presumption that must be rebutted by persons opposing the license. Such being my view, I will decide that the population exceeds 1,500, and therefore warrants the issue of a 4th license.

In dealing with the other point, as to the petition being insufficiently signed, I have more doubt. The Act is very peculiarly drawn, and it apparently contemplates a permanent residence in the same premises. I can hardly believe that that was the intention of the legislature in framing the section, as undoubtedly they wish the petition signed by what they define as a householder, and surely their view must have been only to include such persons as had occupied premises in the locality for a period of 3 months. But, in drafting the section, it can undoubtedly be interpreted one way, i.e., that the person must occupy the same premises for a period of 3 months preceding the date of this signing of the petition. That being my view of the section, it necessarily follows that a great number who have actually occupied premises in Hosmer for a period of 3 months prior to the date of the petition are not necessarily householders

within the meaning of the Act. Eliminating those from the list, it becomes a question of doubt whether or not the petition is properly signed, and in that case I will give the benefit of the doubt to the applicant, in whose favour the commissioners have already decided.

The appeal will be dismissed with costs.

BRITISH COLUMBIA.

HUNTER, C.J. DECEMBER 18TH, 1907.

CHAMBERS.

REX v. McHUGH.

Criminal Law—Selling Liquor to Indian—Conviction—Jurisdiction of Indian Agent—Indian Act—Warrant of Commitment not Shewing Jurisdiction—Habeas Corpus—Discharge.

Application by defendant for a habeas corpus.

The defendant was confined in the provincial gaol at the city of Victoria, under a warrant of commitment, dated 10th December, 1907, under the hand and seal of W. M. Halliday, justice of the peace in and for the district or county of Nanaimo, and the warrant recited the fact that the defendant was on that date "convicted before the undersigned, one of His Majesty's justices of the peace in and for the said district or county of Nanaimo, for that he, the said Michael McHugh, did at Campbell River, in the county of Nanaimo, on Sunday December the eighth instant, unlawfully supply an intoxicant, to wit, gin, to an Indian of the Salmon River Tribe, known as Johnny Klakwatsi, the said intoxicant not being supplied in case of sickness and made use of under the sanction of a medical man or under the direction of a medical man, or under the direction of a minister of religion, and contrary to the form of the statute in such cases made and provided;" and the warrant recited that it was adjudged by the conviction that the defendant be imprisoned in the gaol for the space of 6 months at hard labour.

The warrant was signed, "W. M. Halliday, J.P., Indian Agent," and was under seal.

The application for a habeas corpus was made on the ground that no jurisdiction was disclosed on the face of the warrant or otherwise, and that Halliday could not convict the prisoner as a justice of the peace (because under sec. 135 of the Indian Act, R. S. C. ch. 81, only two justices have jurisdiction), and that, if the warrant was to be upheld, the same should expressly recite the fact of the conviction of the accused before the functionary, as an Indian agent—an Indian agent being under the Act equal to two justices; and on the further ground that, even assuming that the warrant was otherwise good by reason of the words "Indian agent" being added, and that Halliday had convicted the accused in that capacity, still he should and was bound to specify his jurisdiction, in that he should shew or state for what district he was Indian agent.

R. C. Lowe (Moresby & O'Reilly), for the defendant, cited Regina v. Ackerman, 1 B. C. R., part 1, p. 255; 2 Hawk. P. C. ch. 16, sec. 13; 2 Hale P. C. 122; Re Peerless, 1 Q. B. 143; Christie v. Unwin, 11 A. & E. 378-9; Johnstone v. O'Reilly, 12 Can. Crim. Cas. 218; Regina v. McAuley, 14 O. R. 643.

H. D. Helmcken, K.C., for the Crown.

HUNTER, C.J., held that he had no alternative but to grant the motion, as it was a well known principle that inferior courts must shew their jurisdiction on the face of their warrants, and that in this case the mere addition of the words "Indian Agent" was not sufficient, as Halliday should have specified the district for which he was Indian Agent.

Motion granted and prisoner discharged.

BRITISH COLUMBIA.

MORRISON, J. DECEMBER 19TH, 1907.

TRIAL.

MUNRO v. GILLIE.

Executors—Sale of Land—Collusion—Fraud—Account.

Paul T. Gillie, of Nicola Lake, died on 23rd February, 1897, leaving his estate, consisting of a stock-ranch, horses,

cattle, etc., to his executors in trust to sell and divide proceeds between the widow and children, as provided in the will, within one year of his death. Soon after the testator's death the executors, viz., James D. Gillie, his son, and James Chapman, were authorized and requested by the devisees to defer any immediate realization of the estate, the time not being advantageous for a sale, and it was left to the discretion of the executors to sell or further postpone the sale as they saw fit.

Accordingly the property was managed by the executors from year to year till February, 1905, when, in consequence of some family bickerings and dissatisfaction with the management, the executors, after conferring with some of the devisees, decided to realize if a fair price could be got. The property was well advertised in local, coast, and Manitoba papers, and when the time was up for receiving tenders, only one by C. D. Broadbent, for $15,100, was to hand.

After some deliberation this offer was accepted, and the property duly transferred to Broadbent in May, 1905.

The plaintiff, Mrs. Munroe, daughter of the testator and sister of one of the executors, then commenced this action against the executors and Broadbent to have the conveyance and transfer to Broadbent set aside, on the grounds, inter alia, that the sale was fraudulent and collusive and for an improper consideration.

E. P. Davis, K.C., and A. D. Macintyre, for plaintiff.

F. T. Fulton, K.C., and H. L. Thorley, for defendants.

MORRISON, J.:—This is an action by the plaintiff, a married woman, one of the beneficiaries under the will of one Paul J. Gillie, deceased, against the executors and trustees under his will, wherein it is sought to set aside a conveyance of real estate by the defendants as such executors and trustees to one Broadbent, the purchaser.

Paul J. Gillie died on 23rd February, 1897, and the will was proved on 1st May, 1897.

The conveyance to Broadbent was dated 6th May, 1905, and registered 10th May, 1905.

The gravamen of the plaintiff's claim is that the defendants fraudulently and collusively agreed with the purchaser Broadbent to accept the tender made by him for the purchase of the land in question.

After seeing in Court the parties thus charged with this alleged fraudulent transaction, and hearing their evidence, as well as the evidence of other witnesses on their behalf, and after hearing the unsubstantial evidence by and on behalf of the plaintiff, I do not hesitate to say that, in my opinion, the plaintiff has wholly failed to prove her case.

Were the claim for an account sought in connection with a claim more consonant with right and reason than appears in this case, there might be some justification for my entertaining it, but, under the circumstances, considering that I view the acts of the defendants in their capacity as executors and trustees as being bona fide and prudent, I shall leave the plaintiff to whatever remedy may be open to her in respect of an account as between herself and the defendants.

The action is dismissed with costs.

ALBERTA.

BECK, J. NOVEMBER 30TH, 1907.

TRIAL.

CANADIAN BANK OF COMMERCE v. WAIT.

Promissory Notes—Action on—Defence—Fraud, Misrepresentation, and Concealment of Payees — Indorsement by Payees to Bank as Collateral Security for Debt—Absence of Consideration—Notice of Defective Title—Agreement—Pre-existing Debt not Payable at Time of Transfer of Notes —Company—Subscription for Shares Obtained by Fraud —Repudiation—Action on Notes Given for Price of Shares Commenced before Winding-up—Third Party Proceeding —Notice after Commencement of Winding-up.

Two actions, each upon a note for $250, dated 20th September, 1906, made by the defendant, payable to the Red Deer Mill and Elevator Company, and by them indorsed to the plaintiffs, were consolidated. The pleadings and the facts were alike in respect of each note.

Among other defences, it was alleged that the defendant was induced to make the notes by the fraud, misrepresentation, and concealment of the payees of the note, the Red Deer Mill and Elevator Company. The notes were given for shares in the company, and particulars of the fraud, misrepresentation, and concealment by which it was alleged the defendant was induced to subscribe for the shares and make the notes in payment for them, were set forth in the defence.

The defence alleged that the plaintiffs became the holders of the notes with notice of the fraud, misrepresentation, and concealment alleged, and that the plaintiffs took the notes without consideration.

The Red Deer Mill and Elevator Company were added as third parties. By the third party notice the defendant claimed indemnity against the company, repeating the same allegations of fraud, misrepresentation, and concealment.

W. E. Payne, for the plaintiffs and the third parties.

P. J. Nolan, K.C., for the defendant.

Beck, J.:—At the conclusion of the evidence I was of opinion and now find as a fact that the defendant substantially proved his defence of fraud, misrepresentation, and concealment. The notes were handed by the company to the plaintiffs, within a few days after their date, as collateral security for an indebtedness of a large amount owing by the company to the plaintiffs and then current, that is, not then past due. Only after the delivery of the notes by the company to the plaintiffs, but prior to the maturity of the indebtedness of the company to the plaintiffs, the defendant informed the plaintiffs, through their manager at Red Deer, where all the business of the company was transacted, that the financial condition of the company had been misrepresented to him. The bank manager knew at the same time that the notes had been given in payment for shares in the company.

At the trial I was under the impression that under these circumstances the state of the law—contrary to what I thought it ought to be—would not permit of my holding otherwise than that the plaintiffs became holders of the notes for valuable consideration without notice of defect in the company's title to the notes, and, had I remained of this impression, I would have given judgment for the plain-

tiffs, with a stay, however, of execution for 6 months, with the view that by that time either the plaintiffs, who, besides other collateral securities, hold the guaranty bond of the individual directors, would have collected the whole balance owing them, and thus would not be entitled to enforce the judgment, or the defendant, if so advised, might take proceedings against the individual directors for indemnity. Having reserved judgment, and had an opportunity of looking into the authorities, I now give judgment for the defendant, with costs, including the costs in relation to and consequent upon the third party notice, to be paid by the plaintiffs forthwith after taxation.

I do so because, in the first place, I find as a fact that there was no agreement between the company and the bank, as was contended by the plaintiffs' counsel, by virtue of which the plaintiffs were entitled to demand from the company the delivery to them, by way of collateral security, of all or any notes which the company should take on account of payment of the price of shares in the company; and, in the second place, I now hold that, under the circumstances stated, the plaintiffs took the notes without consideration. Those circumstances, to repeat, were that the defendant's notes were handed in to the plaintiffs at a time when the company's pre-existing indebtedness to the plaintiffs was not yet payable even at the company's option; that the defendant would have had a good defence to an action on the notes on the ground of fraud, misrepresentation, and concealment, if brought by the company; and that the plaintiffs had notice of this defect in the company's title to the notes before the company's indebtedness to the plaintiffs matured.

In 9 Cyc., tit. "Commercial Paper," p. 932, it is said: "In the greater number of jurisdictions, a party who receives a promissory note merely as collateral security for a pre-existing debt is held to take the same in the usual course of business, and is considered a holder for value. In a considerable number of other jurisdictions, however, the Courts have taken the opposite view, and have held such a taking to be neither in due course nor for value. Where, however, the transfer is accompanied by some other transaction, promise, or circumstance beneficial to the debtor, it will then constitute a sufficient consideration, although the authorities are not in accord as to just what the additional bene-

fit must be. As a rule, an express agreement to extend the time of the original debt, provided the extension be for a definite time, or the release of other collateral security at that time, is sufficient."

The rule first laid down, leaving out of consideration for the moment the distinction presently referred to, was determined to be the law, both in England and in Canada, before the codifying of the law respecting bills, notes, and cheques: Currie v. Misa, L. R. 10 Ex. 153, affirmed in the House of Lords, but on another ground, sub nom. Misa v. Currie, 1 App. Cas. 554, annotated in 4 Rul. Cas. p. 316, and referred to with approval in McLean v. Clydesdale Banking Co., 9 App. Cas. 95 (H. L.), and followed in Canadian Bank of Commerce v. Gurley, 30 C. P. 583. The statutory provisions are the Bills of Exchange Act, 1882, sec. 27 (Imp.), and the Bills of Exchange Act, 1890, sec. 53 (Dom.) In my opinion, they were intended merely to state the law as previously settled.

In no case, however, as far as I have been able to ascertain, and I was referred to no authority at the trial, was the point of distinction raised on the circumstance of the pre-existing debt not being payable at the time of the transfer of the negotiable paper as collateral security thereto, until the case of Stott v. Fairlamb, 48 L. T. 574, reversed in appeal, 49 L. T. 525. That was an action by the executrix of the payee of a note against the maker. The argument made for the plaintiffs in that case in appeal was: "There was a good consideration for the note. The debt created by the agreement, i.e., a deed of dissolution of partnership (one of the terms of which was, inter alia, to pay £2,000 within 3 years with 5 per cent. interest) was a debitum in præsenti solvendum in futuro; in such circumstances, where the existing facts make it natural for the debtor to pay, the giving of the note (a demand note for the same £2,000 with 5 per cent. interest from the same date as mentioned in the agreement) is payment subject to dishonour, and there is sufficient consideration. This was the principle of the decision of Currie v. Misa." The argument made for the defendant was: "There was no consideration for the note. The defendant obtained no money, no mercy, no benefit of any sort for the giving of it. The agreement was an agreement to pay within 3 years, but it does not necessarily follow that the defendant could

properly pay before the expiration of that time. In Currie v. Misa there was a debt existing and payable at once; that is not the case here." In the Court below, Denman, J., the trial Judge, gave judgment for the defendant. He concludes his judgment as follows: "As it was forcibly put by Mr. Wilberforce for the defendant, what possible advantage could accrue to the defendant, or what burden to Stott, by their respectively entering into a fresh contract that he should be liable to pay, and he be entitled to receive the £2,000 and interest on demand? I can discover none. This being the case, I can see no consideration for the note between the parties to it, nor between the plaintiff, the executrix, and the defendant. I think it was a mere nudum pactum, upon which if Stott had sued he must have failed, and that upon this ground the defendant is entitled to judgment." In giving judgment in appeal, Brett, M.R., says: "The case has been argued on this view of the deed of dissolution of partnership—that that deed made a debt of £2,000 then existing, but payable at some fixed day only of some future time. And the question then arises whether, where there is a debt existing in præsenti, but payable only in futuro, there is any consideration for the giving of any promissory note for that debt, so as to enable the creditor to sue upon the note. Then it is argued that, whichever way that point may be decided, it is not the present case. It is said that the deed of dissolution of partnership made a debt which was not payable only on a future fixed day, but any time within a period of 3 years, and that interest was payable until the debt was paid, so that the debtor had the right to pay off the debt at any time within the period, and so relieve himself of the payment of the interest and discharge his liabilities. Therefore, it is said, when he gave the promissory note, he exercised his right of payment within the time, and made a payment, which was a conditional payment, it is true, but was conditional only in this sense, that the creditors' rights upon the deed should not revive until the note was dishonoured. It has been argued that neither view of this deed of dissolution which I have referred to brings this case within the decision of Currie v. Misa, and if this be true, then we might be at liberty to say that in this case there was no consideration for the promissory note; but in order to decide this case in favour of the defendant we must be of opinion

that it is not within Currie v. Misa on either view of the deed of dissolution of partnership. As to the first view that I have referred to, the question seems very doubtful, but I do not think it is necessary to decide it, because, in my opinion, the second view of this deed of dissolution of partnership is the correct one; in my opinion, the debtor, under this deed, may pay at any time within the stated period, and there are reasons why he should, namely, to escape the payment of interest. The question, therefore, is whether the decision in Currie v. Misa covers such a case as this. That depends upon the principle of the decision in that case. It is true that in that case there was an existing debt payable at once, and, therefore, upon the facts, this case is not within it, but I think it is within the principle upon which it was decided. Currie v. Misa seems to me to lay down this principle, that where a state of things exists which entitles a debtor to pay his debt, the giving of a promissory note is a conditional payment, and there is a sufficient consideration for the note. As this case comes within the terms of this principle, it follows that here the promissory note was given for a good consideration . . . In this case, therefore, which seems to me a difficult case, and the decision in which must not be taken to go further than it really does, I have come to a conclusion different to that at which the learned Judge arrived in the Court below." Baggallay, L.J., and Bowen, L.J., adopt precisely the same view, namely, that, inasmuch as the debtor had a right to pay within the period limited, a demand note was a conditional payment founded on a sufficient consideration.

It is clear then that (1) Currie v. Misa decided that a creditor to whom a negotiable security is given on account of a pre-existing debt, which has become payable in the sense that the creditor may sue, holds it by an indefeasible title, whether the negotiable security be one payable at a future time or on demand; the principle of the decision being (as laid down in Stott v. Fairlamb) that where a state of things exists which entitles a debtor to pay his debt, the giving of a negotiable security is a conditional payment; (2) Stott v. Fairlamb, on the strength of the principle laid down in Currie v. Misa, extends the effect of that decision to the case where the pre-existing debt, though payable in futuro, is nevertheless payable in præsenti, in the sense that the debtor has the right to pre-pay it, though he

cannot be forced to do so; and (3) the Court in Stott v. Fairlamb is most careful to leave open the question of the case where the pre-existing debt is payable in futuro without any right on the part of the debtor to prepay it.

Having, as I think, ascertained the state of the decisions binding upon me, I remark that the question in the present case would have been upon all fours with the question which I have pointed out was left undecided in Currie v. Misa and Stott v. Fairlamb, had the facts been that the company had given their own note to the plaintiffs payable either on demand or at a date earlier than the date of maturity of the company's then existing indebtedness to the plaintiffs.

Taking it as a fact, as I have already found that it is, that the defendant's notes now in question were obtained from him under such circumstances as to prevent the company recovering thereon, would the bank be in any different position? It occurred to me that perhaps the maker of a note turned over by the payee merely as collateral security, as in the present case, might be in a better position than the debtor handing in his own cheque or note, but I have been unable to formulate in my mind any ground of distinction except this: it might possibly be held that the case of a debtor handing in his own note or cheque was equivalent to an agreement between him and his creditor in pursuance of which the instrument (assuming there was but one) representing the original future-maturing liability, was replaced by the debtor's note or cheque handed in to the amount of the note or cheque and a new instrument for the balance. Such an inference, it seems to me, would be too far-fetched, and I should not so hold; but if it were held that such an inference should be drawn in such a case, it seems to me that a similar inference could not possibly be drawn in the case of the handing in of the note of a third party. The plaintiffs, although having, as I hold, received the defendant's notes without consideration and with notice of a defect in title, yet having held them up to the time when the company's indebtedness to them (the plaintiffs) had matured (whether the time for payment was then extended or not, would appear to be immaterial in view of the decision in Currie v. Misa), I am of opinion that at the moment of maturity, but not before, did a con-

sideration for the indorsement of the notes by the company to the plaintiffs arise. In connection with my holding that there was no consideration for the indorsement to the plaintiffs, reference may be made to the following cases in addition to those to which I have already referred: Serle v. Waterworth, 7 L. J. Ex. 202; in appeal sub nom. Nelson v. Serle, 8 L. J. Ex. 305; Crodts v. Beale, 11 C. B. 172, 20 L. J. C. P. 186; Southall v. Rigg, 11 C. B. 481, 20 L. J. C. P. 150; McGilliway v. Keefer, 4 U. C. R. 456; Edwards v. Chancellor, 52 J. P. 454; Ryan v. McKerrall, 15 O. R. 460.

While I hold without hesitation, as I now do, that the plaintiffs took the defendant's notes without consideration, I necessarily do so without entire confidence that my opinion will accord with future decisions of higher Courts, eminent authority having pronounced the question upon which I am compelled to decide, a difficult one, and on that account having refrained from expressing an opinion upon it.

One further question remains to be dealt with, in connection with which the following proceedings with their dates are important. The writ of summons in the first of these two consolidated actions was issued on 30th January, 1907; the defendant was served on 8th February, 1907; appearance was entered on 5th March, 1907; the defendant's affidavit on which his application was founded to add the company as a third party was sworn on 8th March, 1907; the order to add the company was made on 9th March, 1907; the third party notice is dated 11th March, 1907; the company passed an extraordinary resolution for voluntary winding-up and appointing liquidators on 4th March, 1907. Mr. Payne referred me to Hare's Case, 4 Ch. D. 503; In re Scottish Petroleum Co., 23 Ch. D. 435; Oakes v. Turquand, 36 L. J. Ch. 949; In re Burgess, 49 L. J. Ch. 541; and contended that the defendant, not having taken legal proceedings to have his name removed from the list of shareholders before the commencement of the winding-up of the company, he was now too late, and I presume intended his contention to go to the extent that, inasmuch as the defendant must keep his shares, he must pay his notes, even in face of a finding that the defendant had been induced to subscribe for the shares and give his notes in payment of them by fraud, misrepresentation, and concealment, and that the plaintiffs took the notes without consideration.

Prior to the Judicature Act it was established law that a repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, subject to the qualification that if one repudiating shareholder takes proceedings, the others will have the benefit of them, if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings: In re Scottish Petroleum Co., 23 Ch. D. 413, 436; Thomson's Case, 5 Manson 282.

Under the practice introduced by the Judicature Act, however, where a shareholder was sued by the company for calls, and an application was made for leave to sign final judgment, and, before the commencement of the winding-up proceedings, the defendant, on opposing the application, obtained leave to defend on an affidavit to the effect that he had been induced to take the shares by misrepresentation, and intended to counterclaim for a rescission of the contract to take the shares, it was held that the shareholder had brought himself within the principle and intent of the established rule, notwithstanding that the counterclaim was not delivered until after the commencement of the winding-up proceedings: In re General Railway Syndicate, Whiteley's Case, [1900] 1 Ch. 365.

In the present case the evidence shews clearly that the defendant repudiated his contract to take the shares allotted to him with reasonable promptitude before the commencement of winding-up proceedings. He was sued for the consisderation before the commencement of winding-up proceedings. The practice permitted him, without the necessity for obtaining leave, as in Whiteley's case (supra), to take steps in this action to have the contract rescinded, and he did so in due course, by his defence and third party notice. In holding, as I do, that he was not too late, although his third party notice was not issued until after the commencement of winding-up proceedings, I think I am not extending the principle or intent of the decision in Whiteley's Case (supra). Even if I should be wrong in so holding, it seems to me that it does not follow that the plaintiffs should succeed, one reason being that if the plaintiffs should succeed the result might be to the prejudice of the unsecured creditors of the company.

ALBERTA.

STUART, J. DECEMBER 2ND, 1907.

TRIAL.

INTERNATIONAL COAL AND COKE CO. v. TRELLE.

Covenant—Transfer of Land—Restriction as to Carrying on Business of Selling Intoxicating Liquors — Violation—Injunction—Agreement for Sale—Merger in Transfer—Transfer not Executed by Covenantor — Acceptance and Registration — Voluntary Covenant — Specific Performance — Restraint of Trade — Public Policy — Plaintiffs Waiving Covenants in Similar Cases—Laches—Interest of Plaintiffs in Performance of Covenant.

Motion by plaintiffs for an interim injunction to restrain the defendant Trelle from carrying on the sale of intoxicating liquors in a hotel, on land in Coleman, Alberta, purchased by the defendant Trelle from the plaintiffs, subject to a covenant, contained in a transfer of the land under the Land Titles Act, that the defendant would not conduct such business upon the premises.

Defendant, some time after obtaining the title, obtained a license, and, without the consent of the plaintiffs, began the sale of intoxicating liquors.

By consent the application for an injunction became the trial of the action.

W. L. Walsh, K.C., for the plaintiffs.

R. B. Bennett, K.C., and L. M. Johnstone, for the defendant.

STUART, J.:—I think I may now assume that the plaintiffs' counsel does not intend to put in any further authorities under the leave granted at the hearing. Perhaps he may have decided, after an examination of the authorities cited by the defendant, that these latter were sufficient for his purpose. If this is the real explanation of his failure to furnish any other citations, I am rather disposed to agree that this was the wisest course. I have examined conscientiously the almost innumerable authorities quoted by the defendant, and

I have come to the conclusion that, in so far as they are in the least degree relevant—a test which will exclude at least two-thirds of them from consideration—they rather favour the plaintiffs' contentions.

The defendant, when purchasing the property in question, executed an agreement which contained a specific covenant that "no tavern, inn, hotel, beer-house, or place licensed for the sale of any wines, spirits, beers, or liquors, shall be opened or conducted, nor shall any wines, spirits, beers, or liquors be sold or disposed of in any manner whatever, nor the business of a licensed victualler be carried on upon the said lands, nor shall any building erected upon the said lands be used for any of the purposes aforesaid for the term of 15 years from the date hereof without the consent of the said company, its successors or assigns, first had and obtained in writing." Subsequently the defendant accepted under protest, as he said, a transfer of the lands, which contained the following proviso: "Subject also to the restriction, which is hereby declared annexed so as to run with the title to the land and to be enforceable as a covenant made by the transferee, his heirs, executors, administrators, and assigns, with the company, its successors and assigns, that no tavern . ." (etc., following the words of the agreement above quoted) . . "it being mutually agreed that an application for a license for any of the purposes hereinbefore set out shall be conclusive evidence of a breach of this covenant and restriction." This transfer, as I find as a fact from the evidence, was duly registered either by the defendant or by some person acting for him, and a certificate of title was issued to the defendant for the land in question, which was expressed to be "subject also to the rights, conditions, reservations, and covenants contained in transfer registered as 4339 L," being the transfer above referred to.

About 1st March, 1906, the defendant applied to the board of license commissioners for a license to sell liquor on the premises in question. The plaintiffs, by their advocate, one T. B. Martin, attended at the meeting of the board, and, as I find, made a formal objection to the issue of the license. Notwithstanding this, the license was granted, and the defendant proceeded to carry on the hotel business and to sell liquor by retail on the premises until 25th June, 1906, when the plaintiffs began this action asking for an injunction restraining the defendant from breaking the covenant referred

to. An application was made for an interim injunction, and by consent the application was turned into the trial of the action.

The defendant does not deny that he was in fact committing a breach of the covenant, but he suggested several reasons why an injunction should not issue restraining him from so doing.

The first ground taken is that the agreement became merged in the transfer, and that, as the latter was not executed by the defendant, he is not bound by the proviso or so-called covenant contained in it, and he is, therefore, relieved from the covenant entirely. I do not think that this contention can be sustained. No doubt, there are a number of authorities which lay down the principle that when a preliminary agreement has been made between two parties which contemplates the execution of a more formal deed containing the terms of the agreement in more extended form and the covenants by which the parties are to be bound, in such case it is the final deed alone which must be looked to, and that the preliminary agreement becomes merged in the deed; but I am of opinion that the present case is of quite a different nature. Reading the agreement of 22nd October, 1903, I cannot see how it can be contended that it was ever contemplated by the parties that the transfer should supersede the agreement entirely. The parties were, no doubt, aware that a transfer under our registration system is not in form, and is very seldom in practice, a deed inter partes such as existed in the case referred to by the defendant. It was, therefore, I think, the clear intention of the parties that the preliminary contract, namely, the agreement of 22nd October, 1903, should go on after the transfer had been executed, and should continue to bind them in so far as it had not been executed, in the sense of completely fulfilled, by the payment of the purchase price and the issue of the transfer: Palmer v. Johnson, 13 Q. B. D. 351; Smith v. Tennant, 20 O. R. 180.

Besides, I think I can go further and say that even if the defendant had not executed an agreement containing a covenant at all, he would, nevertheless, probably have been bound to observe the conditions contained in the transfer which he accepted and registered. There is a long line of authorities which establish the principle that, where property is sold under a deed containing a restrictive covenant by the purchaser not to use the property in a certain manner, all sub-

sequent purchasers from the first purchaser who take with notice of the covenant, can be compelled by injunction to observe its provisions: Tulk v. Moxhay, 13 Jur. 89; Witham v Vane, 44 L. T. 718; Haywood v. Brunswick Building Society, 8 Q. B. D. 407; Knight v. Simmonds, [1896] 2 Ch. 294; Fornby v. Barker, [1903] 2 Ch. 539; Osborne v. Bradley, [1903] 2 Ch. 446; Re Nisbet and Potts's Contract, [1906] 1 Ch. 386.

Now, it would appear to me to be rather strange if a sub-purchaser, who has entered into no covenant, but has simply taken his title with notice of covenant by his vendor, can be forced to observe its provisions, and yet that a person in the position of the present defendant who takes a transfer under our Land Titles Act, containing such a restriction as was inserted in the transfer in this case, and who accepts that transfer and registers it and enjoys the property under it, should be permitted to disregard the restriction, even if there were no antecedent agreement containing a covenant executed by him. It is, of course, not necessary to decide this absolutely in this present case, because of the existence of the actual covenant on the part of the defendant.

It was further contended that the covenant contained in the agreement, the breach of which is complained of, was a separate and distinct covenant to which no separate or distinct consideration was attached, and that, therefore, it must be considered as a voluntary covenant, which, according to the well known rule, will not be enforced by the equitable remedy of specific performance. I am, however, of the opinion that the covenant in question was part of the consideration which the defendant was paying for the land, because the very clause of the agreement wherein the plaintiffs agree to convey the property to the defendant upon payment of the purchase price, expressly states that the conveyance is to be subject "to the reservations and conditions in these presents contained, which said conditions and reservations shall be embodied in the said deed of conveyance." The land he was to get was, therefore, the consideration both for the purchase price which the defendant paid and the covenant which he made in respect to its user.

There was also a good deal said about the covenant being a covenant in restraint of trade, and that it was, therefore, contrary to public policy. I cannot see how the well known principles which deal with covenants in restraint of trade,

contained, as they usually are, in agreements for the sale of business concerns and the goodwill connected therewith, can be applied to a case of this kind, which arises from circumstances entirely different. The authorities to be examined are surely those which deal with the covenants so frequently found in agreements for the sale of property by one vendor to a number of purchasers under a subdivision and building scheme. An examination of these will shew that the Courts have again and again enforced just such a covenant as this in cases where the vendor has desired to preserve a certain general uniformity in the character of the buildings to be erected or to exclude the carrying on of noxious trades in the neighbourhood. Besides, it does strike one as rather peculiar to hear the doctrine regarding covenants in restraint of trade being contrary to public policy invoked in connection with that particular trade which, as a matter of fact, it is the policy of the legislature to restrain. It was suggested, of course, that as the regulation and restraint of the liquor traffic has been assumed by the government as part of its duty in the public interest, therefore an attempt by any individual owner of land to place additional restrictions upon it within the area covered by his land which he is subdividing and selling, must be considered as an infringement of public rights, and therefore contrary to public policy. I cannot see, however, why the fact that the legislature has itself introduced a certain system of restraint and regulation with respect to the particular trade in question, should be held to destroy the long-acknowledged right of an individual owner to make contracts with his purchasers and to exact covenants from them regarding the particular use to which the property shall be put.

It is said further that the plaintiffs have allowed certain other persons who had purchased lots under agreements containing the same covenant to commit a breach of the covenant without objection, and that therefore they are precluded from now enforcing the covenant against the defendant.

I do not think, however, that the facts in this case are sufficient to bring it within this rule. It will be observed that the covenant is not an absolute one to refrain from using the land in a certain manner, but the covenant to refrain from so doing without the consent of the vendors. There were only three instances suggested in which the covenant

was not being observed. In the first case, the plaintiffs had directly given their consent, which, I think, removes it from consideration. In another case, it appeared that the purchaser had gone into possession of the property before any formal agreement had been signed, having merely paid a deposit and received a receipt. Having been once let into possession, he refused to sign the agreement with the covenant in it. It would appear that he was, therefore, in a position to enforce specific performance of the verbal contract for sale, and that the plaintiffs were unable to exact the covenant from him. These facts, in my opinion, remove this case also from consideration. It was not suggested that the plaintiffs were bound to exact the covenant from every purchaser, or that their failure to do so would relieve those who in fact entered into the covenant. The remaining case is that of Evans, and it appears that the plaintiffs have begun an action against him for breach of his covenant. It was suggested that they had waited too long in his case before commencing action, but the exact length of time which had elapsed was not clearly shewn. It may be that the plaintiffs are still entitled to succeed against him; or it may be that, when that case comes to trial, it will be found that they have precluded themselves by delay from succeeding in an action for an injunction; but I cannot try that action as incidental to this one. I think, in order to give any weight to the objection in so far as Evans's case is concerned, I would first have to decide that the plaintiffs had actually lost all right to proceed against him by way of injunction or for damages. This, I think, it is impossible for me to do, so that the defendant must fail on this ground also.

It is further objected that the plaintiffs have lost their right to enforce the covenant by injunction through their delay in taking proceedings. Reference was made to paragraph 14 of the defendant's affidavit of 27th October, 1906, wherein he states that he commenced to erect a building in the winter of 1903-4. If it had been established that the defendant erected this building with the sole intention of carrying on a retail liquor business therein under a license, and this to the knowledge of the plaintiffs, I think there would have been considerable force in the defendant's contention, and that the case would have come within the principle of such a case as Eastwood v. Lever, 33 L. J. Ch. 355.

The defendant, however, says that he at first endeavoured to conduct the hotel without a license, and it appears that it was not until 31st December, 1904, that is, about a year after the building was constructed, that the defendant applied to the plaintiffs for permission to conduct a licensed hotel, and that before the defendant even made his application for a license in 1905 he had been distinctly informed by the plaintiffs that they did not as yet see fit to grant him the permission required. I think the most that can be inferred from the evidence in regard to the construction of the building is this, that the defendant constructed it with the intention of carrying on a boarding house or unlicensed hotel, as he, in fact, did for some time, but also with the hope that he would eventually succeed in obtaining the consent of the plaintiffs to the carrying on of a licensed liquor business. There is nothing, therefore, to shew that the plaintiffs could have interfered in any way with the construction of the building, and it appears that they objected to his application for a license successfully in 1905, and unsuccessfully in 1906. The sole question is, therefore, whether the delay from the beginning of March to 25th June is sufficient to destroy the plaintiffs' right to the equitable remedy of an injunction. This is the trial of the action, and the rights of the parties are to be finally decided. It may be that the delay would have been sufficient to prevent the issue of an interim injunction; but a larger degree of acquiescence is necessary in case of a final decision upon the rights of the parties: Patching v. Gubbings, 17 Jur. 1113, and Richards v. Revitt, 7 Ch. D. 224. It was, of course, possible for the plaintiffs to have acted more promptly, but they at any rate protested on 16th March against the threatened breach of the covenant, and I can quite understand that in the case of an incorporated company, one of whose officials at any rate, namely, the president, resides in the city of Victoria, British Columbia, and which, before commencing litigation, would possibly need to have such a proceeding authorized by a meeting of the board of directors, a delay of 3 months might be unavoidable. None of the cases cited upon this point furnishes an example of a delay of so short a time as this constituting laches sufficient to defeat the plaintiffs' right of action.

Finally, it is contended that, as the plaintiffs have no immediate and direct financial interest in the observance of

the covenant, and as they have suffered no direct pecuniary damages from the breach of it, they are therefore not entitled to succeed. In my opinion, this contention also cannot prevail. I have examined a large number of cases dealing with breaches of such a restrictive covenant as is in question here, and I cannot find that the non-existence of actual and substantial damage was ever suggested as a reason for refusing an injunction. On the contrary, there is quite sufficient authority to shew that the existence of damages is not necessary: Doherty v. Alman, 3 App. Cas. 720; Richards v. Revitt, 7 Ch. D. 224; Wilson v. Hart, L. R. 1 Ch. 463. Moreover, it appeared in evidence that the plaintiffs were the operators of a coal mine employing some 450 men, and that this industry constituted practically the sole reason for the existence of the town of Coleman. It seems to me that it is very directly to the interest of the plaintiffs that these workmen should be of sober and steady habits, and, therefore, that even a more severe restriction of the number of licensed hotels than the licensing board might be inclined to allow, might be very much in the interests of the employers of these men.

This, I think, exhausts the reasons which were pressed upon me so earnestly by the counsel for the defendant; but, notwithstanding the urgency of their appeal to the Court, I cannot see that they have suggested any real reason why the defendant should expect to be relieved from the necessity of complying with the terms of the covenant into which he solemnly entered.

The defendant, in his affidavit, endeavoured to shew that the necessary consent had in fact been given; but this position was abandoned, and I think, in view of the evidence, quite properly so, at the hearing.

There will, therefore, be judgment for the plaintiffs with costs, and a perpetual injunction will be granted in the terms of the plaintiffs' prayer as contained in paragraph 7 (1) of their statement of claim.

ALBERTA.

BECK, J. DECEMBER 4TH, 1907.

CHAMBERS.

RE SAWYER-MASSEY CO. AND DENNIS.

Land Titles Act—Agreement to Mortgage Homestead before Recommendation for Patent—Invalidity—Dominion Act —Alberta Act—Legislative Jurisdiction—Assignment or Transfer—Construction of Statutes.

A. F. Ewing, on behalf of F. W. and J. Dennis, the caveatees, obtained an originating summons under sec. 91 of the Land Titles Act (Alberta, 1906), to discharge a caveat filed by the caveators, the company, who thereby claimed to be entitled to have a mortgage executed in their favour upon the lands in question according to the terms of a sealed agreement dated 15th May, 1906, made by the caveatees. The agreement was put in, and it appeared that the claim was made under a clause therein which read as follows: "And for the purpose of securing payment of the price of the said machinery and interest . . . each of the purchasers agrees to deliver to the company at the time of their receiving the said machinery a mortgage on the lands described on the back of this agreement as being owned by him, in the statutory form," &c.

The grounds set up by the caveatees for the discharge of the caveat, as they appeared by affidavit, were:—

1. That the caveatees signed the agreement, which was an order for machinery, under mistake and by reason of misrepresentation made by the caveators' agent.

2. That the caveatees were respectively homesteaders under the Dominion Lands Act of the respective parcels of land in question, and that these lands had not at the date of the agreement been recommended for patent, and that no declaration had been made by the Minister of the Interior to prevent the agreement being void under the Dominion Lands Act, R. S. C. 1906 ch. 55, sec. 142.

The summons was heard by BECK, J., in Chambers.

A. F. Ewing, for caveatees.

O. M. Biggar, for caveators.

BECK, J.:—Upon the summons coming on for hearing before me, I intimated that I would not deal summarily with the first ground, in respect of which I thought it would be proper to direct, under sec. 92 of the Land Titles Act (Alberta, 1906), that an action should be brought. This view was acceded to by Mr. Ewing, for the caveatees, and by Mr. Biggar, who appeared for the caveators, and the argument was confined to the second ground.

Mr. Ewing referred to Harris v. Rankin, 4 Man. L. R. 115; Flanaghan v. Healey, 4 Terr. L. R. 391; Abell v. McLaren, 13 Man. L. R. 463; Cummings v. Cummings, 15 Man. L. R. 640; and the Land Titles Act (Alberta, 1906), sec. 60, sub-sec. 3, as substantially a re-enactment of the Land Titles Act (Dom.), sec. 18, as shewing the agreement made prior to recommendation for patent to be void.

It was virtually conceded by Mr. Biggar, in view of the terms of the Dominion Lands Act and the above cited authorities, that, in the absence of a declaration by the Minister of the Interior to the contrary, "every assignment or transfer of homestead or pre-emption right, or any part thereof, and every agreement to assign or transfer any homestead or pre-emption right, or any part thereof, after patent obtained," made prior to recommendation issued and countersigned, was absolutely void, not merely at the option of the Minister of the Interior, but also as between the parties: and I so hold. He contended, however, that a mortgage under our system, being a mere charge, was not an "assignment or transfer," or an "agreement to assign or transfer," and that, although as long as the Land Titles Act (Dom.), R. S. C. 1906 ch. 110, sec. 96, remained in force, which enacts that, "notwithstanding anything contained in this Act, any such mortgage shall be deemed an assignment or transfer prohibited by the Dominion Lands Act," such an agreement as that in question would be void, yet that upon the coming into effect of the Land Titles Act (Alberta, 1906), the declaratory provision just quoted became thereby repealed, and that, although re-enacted in substance in the Land Titles Act (Alberta, 1906), it is there ultra vires of the provincial legislature.

I find that the Land Titles Act (Alberta, 1906), although passed on 9th May, 1906, did not come into effect until 8th September, 1906, in pursuance of a proclamation of the Lieutenant-Governor. The agreement in question is dated

15th May, 1906, and was therefore made at a time when the Land Titles Act (Dom.) was still in force in the province by virtue of the provisions of the Alberta Act.

Under these circumstances, it seems to me that I must hold, as I do, that the agreement is void.

Although I think not raised in argument, I have not overlooked the view that the effect of the Alberta Act was not to continue in force in the province such Dominion statutes as were then in force in the Territories and related to subjects over which the provinces were given legislative jurisdiction, in such sense that such Dominion statutes would be in force in the province proprio vigore, but was to take, as a body of law, all the various laws comprising the body of English law previously introduced into the Territories and the Dominion and territorial statutory law then in force in the Territories, and make that body of law the law of the province, subject to the provisions of the British North America Act as modified by the Alberta Act (or more accurately of the Alberta Act) and the legislative jurisdiction of the province thereunder; and that, therefore, the argument against the validity of the declaratory clause in the Land Titles Act(Alberta, 1906), is equally applicable to the corresponding clause in the Land Titles Act (Dom.) subsequently to the constitution of the province.

This point was not argued, and, as the principle involved might be of far-reaching effect, I refrain from expressing an opinion upon it, because I think it unnecessary to do so in the present case. I do not find that the Land Titles Act (Dom.) has ever been directly repealed. Indirectly it may have been repealed so far as applicable to that portion of the Territories established as the province of Alberta, by the coming into force of the Alberta Act, on the view already suggested, or again by the passing of the Land Titles Act (Alberta, 1906). I take the view that in whichever of these ways it was that the Dominion Act ceased to be in force in the province, and probably if repealed by direct legislation, the legislative declaration once made would, in view of the mode of or reason for the repeal, continue still an effective legislative interpretation. In any case the provincial legislature was competent to say that a mortgage or an agreement to give a mortgage upon land prior to recommendation for patent is void. Did it do so in enacting that a mortgage under the Land Titles

Act (Alberta, 1906) is in the nature of the assignment or transfer which is prohibited by sec. 42 (Dominion Lands Act, R. S. C. 1886 ch. 54, now R. S. C. 1906, sec. 142) of the said Act?

The language is perhaps not very appropriate, but, taking the history of the enactment into consideration, the intention to do so is plain, and I therefore hold that to be the meaning of the enactment.

The result is, that I hold the agreement in question void, and order that the caveat be discharged; the order not to be acted upon for one week from this date, to afford the caveators an opportunity of applying for a stay of proceedings if they wish to appeal; costs to the caveatees.

ALBERTA.

BECK, J. DECEMBER 6TH, 1907.

CHAMBERS.

SPEERS v. McAFEE.

Costs—Mechanics' Liens—Extension of Time for Payment by Terms of Contract—Action Begun before Expiry of Extended Time—Costs Incurred in Service of Process—Alberta Mechanics' Lien Act, sec. 7—Provision of sec. 17 as to Posting of Pay Roll—Non-compliance with.

Motion made in Chambers by consent of both parties for an order disposing of a question of costs.

The action was commenced on 17th October, 1907, to realize a mechanic's lien, filed on 24th September, 1907, in respect of work and materials finished or discontinued on or about 27th August, 1907; the plaintiff claimed a balance under contract of $1,250, of which $550, it was alleged in the statement of claim, would become payable on 5th October, 1907, and $700 on 1st November, 1907.

The Mechanics' Lien Act (ch. 21 of 1906), sec. 7, is as follows: "The taking of any security for, or the acceptance of any promissory note for or cheque which on presentation is dishonoured, or the taking of any other acknowledg-

ment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this Act, unless the lien-holder agrees in writing that it shall have that effect. Provided, however, that a person who has exceeded the time for payment of any claim for which he has a lien under this Act, to obtain the benefit of this section, shall institute proceedings to enforce such lien within the time limited by this Act, but no further proceedings shall be taken in the action until after the expiration of such extension of time. Provided further that, notwithstanding such extension of time, such person may, where proceedings are instituted by any other person to enforce a lien against the same property, prove to obtain payment of his claim in such suit or action as if no extension had been given."

On 22nd October, 1907, that is, after the first instalment of $550 had become past due, and before the second instalment of $700 had become due, the plaintiff obtained an order for service of the defendant out of the jurisdiction. The question to be decided was, whether the costs of this order and any subsequent costs were properly payable by the defendant in view of the terms of the above quoted section—" no further proceedings shall be taken in the action until the expiration of such extension of time."

G. B. O'Connor, for plaintiff.

H. A. Mackie, for defendant.

BECK, J.:—I am of opinion that the section should be construed distributively, that is, whereas in this case payment is deferred not to one fixed future date but to several by way of payment in instalments, default in payment of any of several deferred payments entitles the lien-holder to take any proper further proceedings in the action.

I therefore am of opinion that as against this objection the defendant should pay the costs of the order for service ex juris and of any subsequent proper proceedings.

It was objected, also, that by virtue of sec. 17 of the Act the plaintiff had no right of action, inasmuch as it was admitted that he had not complied with the provision as to posting up a copy of the receipted pay roll on the first legal day after pay day, and that therefore the plaintiff was not

entitled to his costs of the action. Section 17 is as follows: "No contractor . . . shall be entitled to demand or receive any payment in respect of any contract where the contract price exceeds $500 until he . . . shall post upon the works . . . a copy of the receipted pay roll . . . on the first legal day after pay day and shall have delivered to the owner . . . the original pay roll containing the names of all labourers who have done work for him upon such works or improvements, with a receipt in full from each of such labourers, with the amounts which were due and had been paid to each of them set opposite their respective names . . . and no payment made by the owner without the delivery of such pay roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate, or interest in favour of any such labourer. . . ."

The foregoing section is in the same words as sec. 12 of the Mechanics' Lien Act of British Columbia, R. S. B. C. 1897 ch. 132.

There is no corresponding provision in Ontario or in any other province, so far as I can ascertain; nor can I find any reported decision upon the section.

I cannot think that it was the intention of the legislature that non-compliance with this section should prevent the coming into existence of a lien under the Act or have the effect of nullifying a lien which has already come into existence, nor prevent a person claiming a lien from keeping it alive by commencing proceedings within the 31 days' limit fixed by the Act. Section 28 provides in effect, so far as it is necessary to refer to its provisions in this connection, that where it appears to the Court or Judge that the proceedings have been occasioned by the failure of the contractor to comply with the provisions of the Act, such Court or Judge may order the contractor to pay all the costs of the proceedings.

Section 17, the one directly under consideration, seems to me to be intended solely to protect the labourers and to afford the owner the means of securing himself from liability to the labourers; the extreme amount of the labourer's lien being as against the owner, so as to extend his liability beyond the contract price, limited to 6 weeks' wages, by sec. 32. By sec. 17 the owner is protected, although the post-

ing is not done, if the original pay roll receipted in full is delivered to him.

I think, therefore, that as against the two objections taken, the plaintiff's lien must be taken to be valid, and the proceedings properly commenced, and that the provision of sec. 17 that "no contractor . . . shall be entitled to demand or receive any payment until," etc., is intended to be given effect to in the course of the proceedings by way of their further maintenance in default of production of the original receipted pay roll or other proper evidence of the non-existence of valid claims of labourers and by way of special directions as to costs.

There was nothing said when the question of costs was left to me to lead me to suppose that the non-production of evidence of the payment of the labourers was the substantial reason for the non-payment of the balance of the contract price, and I am assuming that it was not so. I understand that the action has gone no further than the service of the writ. I see no reason for depriving the plaintiff of his costs to that extent, and to that extent I order the defendant to pay them.

I give no costs of this application.

ALBERTA.

BECK, J. DECEMBER 12TH, 1907.

CHAMBERS.

RE ROUECHE.

Land Titles Act—Land Vested in Two Executors—Death of One—Power of Survivor to Make Transfer under the Act —Construction of Act—Trustees—Joint Tenants.

Application for a grant of letters of administration to the estate of Thomas R. Roueche, one of two executors of the will of Charles Layton, deceased. It was made to appear that the two executors were, in that capacity, the registered owners of certain land in the South Alberta land registration district, and it was stated that the Registrar declined to recognize the

right of the surviving executor to deal with the land, ruling that a new legal representative must be appointed to take the place of the deceased executor; and hence the application.

B. Morton Jones, for the applicant.

The Registrar, in person.

BECK, J.:—In the first place, the application under any circumstances should have been not for letters of administration to the estate of the deceased executor, though limited as is proposed to his estate "as executor of the will of Charles Layton, deceased," but for letters of administration de bonis non of the estate of Charles Layton, deceased.

For reasons which I shall presently state, I think occasion may arise in certain cases where letters of administration in the latter form may properly be granted, although there be a surviving executor.

In the present case I am of opinion that the view said to have been taken by the Registrar is wrong; that the grant not only is unnecessary but would be improper. It is quite clear that independently of the provisions of the Land Titles Act, in view of which, no doubt, the Registrar has formed his opinion, the whole estate, vested in a number of executors as such, vested on the death of one in the surviving executors. See Tristram & Coote's Probate Practice, Canadian ed., p. 23 et seq., and cases there cited.

Section 47 of the Land Titles Act enacts that "no memorandum or entry shall be made upon a certificate of title or upon the duplicate thereof of any notice of trusts, whether expressed, implied, or constructive; but the Registrar shall treat any instrument containing any such notice as if there were no trust, and the trustee or trustees therein named shall be deemed to be the absolute and beneficial owners of the land for the purposes of this Act."

That this and many other sections of the Act have a much more limited effect than at first reading might perhaps be supposed will be seen by a perusal of the case of Wilkie v. Jellett, 2 Terr. L. R. 133, 26 S. C. R. 282, and the earlier case of Re Rivers, 1 Terr. L. R. 464, where the editorial note points out the distinction between the two cases; and sec. 76 of the Act. Section 47 is primarily a direction to the Registrar, although no doubt it would effect, in part, what is expressed in sec. 135, namely, that no person contracting or dealing

with or taking or proposing to take a transfer, etc., from the certificated owner, shall be affected by notice, direct, implied, or constructive, of any trust in the land.

But sec. 47, in my opinion, clearly does not make it improper that in issuing a certificate of title to transferees designated in the transfer to them either generically as trustees or specifically as executors or otherwise as trustees by reason of a particular office or capacity, the Registrar should so describe the transferees. To do so would not, in my opinion, contravene the terms of sec. 47 taken alone. Section 137, however, in my opinion, clearly indicates that transferres taking as trustees should be so described. That section provides in effect that "upon the transfer of any land to two or more persons as joint owners to be held by them as trustees," the Registrar is, but only under certain circumstances, to mark the certificate of title with the words "no survivorship," and that after such entry has been made and signed by the Registrar . . . it shall not be lawful for any less number of joint owners than the number so entered to transfer or otherwise deal with the land without obtaining the sanction of the Court or a Judge by an order on motion or petition."

In case such an entry were made upon a certificate of title issued to two or more executors, the rule of law that the death of one would vest the estate in the survivors would clearly be displaced. In the absence of such an entry, that rule, in my opinion, obtains.

It may be objected that what I have said is admittedly correct where the transfer is expressed to be to the transferees "as joint owners to be held by them as trustees," but not otherwise.

In my opinion, it is not necessary to express the joint ownership in terms; there arises from the expression of the trusteeship the necessary implication of joint tenancy. Chapter 37 of the C. O. 1898 reads as follows: "Wherever by any letters patent, transfer, conveyance, assurance, will, or other assignment, land or any interest in land is granted, transferred, conveyed, assigned, or devised to two or more persons other than the executors or trustees in fee simple, or for any less estate, legal or equitable, such persons shall take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, conveyance, assurance, will, or other assignment, that they take as joint tenants." The exception from the opera-

tion of this Ordinance of "executors or trustees" has the effect merely of continuing with regard to executors and other trustees the previously existing law, that is to say, they take as joint tenants unless the instrument under which they take shews that such is not the intention.

In the case of executors the terms of the will are no longer, in my opinion, material upon the question of whether the executors take as joint tenants or tenants in common, inasmuch as the real estate of the testator vests in the executors not by force of the will or of any devise therein, but of the Land Titles Act, sec. 74.

I refuse the application. I have no doubt that the Registrar, upon being applied to again, will act in accordance with this opinion.

ALBERTA.

STUART, J. DECEMBER 20TH, 1907.

TRIAL.

LEVALLEE v. LANNIC.

Defamation — Newspaper Article Signed by Defendant — Identity of Plaintiff with Person Mentioned in Article— Article Published in Words of Manuscript of Defendant— Proof of—Damages—Costs.

Action for libel. The writing complained of was an article published in "The Journal," an Edmonton newspaper, over the signature of the defendant.

H. A. Mackie, for plaintiff.

C. F. Newell, for defendant.

STUART, J.:—The defendant, although pleading justification, gave no evidence in support of that plea, or indeed in support of any plea. The only grounds relied upon by his counsel were: first, that the plaintiff had not proved that the Joseph Levallee mentioned in the article published was the same person as the plaintiff; and, secondly, that he had not proven that the article published was in the exact words of

the written manuscript handed to the editor of the "Journal" by the defendant. I overruled the first objection at the close of the case. As to the second, I have on consideration come to the conclusion upon the evidence that as a matter of fact the letter published is identical with that handed to the editor by the defendant. The witness Cunningham merely said that he may have altered the phraseology, or may have corrected the syntax. I am convinced, from the defendant's own evidence and from the evidence of the editor of the "Bulletin," who swore that a letter in exactly the same words as that which appeared in the "Journal," and which had been published in the "Bulletin," had been sent to his office for publication, that the letter as published in the "Journal" is in exactly the same words as that which was handed to the editor Cunningham. The letter is clearly libellous, and the plaintiff is therefore entitled to judgment. I do not think, however, that any very serious damage was suffered by the plaintiff, and I think a judgment for a small amount will do substantial justice. I fix the damage at $50, for which sum there will be judgment for the plaintiff with costs on the lower scale, but without set-off.

ALBERTA.

STUART, J. DECEMBER 20TH, 1907.

TRIAL.

EASTON v. ANDERSON.

Ejectment — Mesne Profits — Improvements — Evidence — Damages—Costs—Set-off..

Action to recover possession of land and for mesne profits.

The plaintiff had the title to the land. The defendant was in possession, as he alleged, under an oral agreement with the plaintiff to the effect that the plaintiff would secure the land for the defendant and sell it to him at the figure he purchased it for, as an inducement for the defendant to leave his home in Ontario and come to live near the plaintiff, to whose daughter the defendant was married, which the defendant did, as he alleged.

C. A. Grant, for plaintiff.

C. F. Newell, for defendant.

STUART, J.:—At the close of the case I held that the plain-
f was entitled to judgment for possession, but, with the con-
nt of his counsel, directed that the writ of possession should
t issue until 15th March, 1908, and I reserved the questions
to damages and mesne profits raised by the plaintiff and
e question as to the defendant's improvements. The evi-
nce as to mesne profits and improvements was rather vague
both sides. In any case, as I intimated at the hearing, both
mages and mesne profits would not be recovered. The de-
ndant was extremely reluctant to place any value upon his
provements, and it was only after I pressed him to express
opinion that he mentioned the sum of $500. I am afraid,
wever, that in view of the extremely meagre evidence as to
at these improvements consisted of, I cannot allow him any
h sum. It does, indeed, appear that he did some clearing
d breaking and some fencing, that some of his lumber went
o the house, and that he dug a well. The exact value of
ne of these was stated or even estimated except the mention
the lump sum of $500. The defendant cannot, I think,
ect me to give him credit for that amount in the circum-
nces. He was, however, entitled to remove the crop of
06, even without the consent of the plaintiff, because at the
e it was shewn the tenancy at will had not been deter-
ned. He should have given up possession after the harvest
that year, and the plaintiff is entitled to either mesne profits
damages from that date. He, however, had consented that
defendant should remain in possession during the winter
1906-07, and I do not think that he suffered any serious
nage owing to the defendant's possession during that time.
th regard to the season of 1907 the position of the parties
different. The defendant remained in possession in de-
ce of the plaintiff, having, as he himself alleged, only a
mise of a gift of the place. He knew long before April,
7, that the plaintiff did not intend to make any such gift,
l he should have acquiesced and quietly left. True, he
erts that he would have left it, if he had been paid a cer-
n sum for his improvements, but there is nothing to shew
n now that his claim was a proper and just one. The
endant clearly lost a tenant who was ready and willing to
$200 rental for the place for the season of 1907, and who
in fact make a deposit of $50 in cash on account, which
plaintiff was obliged to return, owing to his inability,
ough the defendant's perversity, to give possession. I

think the defendant is clearly entitled to a judgment for $200 damages on this account. Whether there should be any set-off against this on account of the defendant's improvements is very doubtful. No doubt, the defendant has made some improvements, but whether they amount to much more than any tenant would do for his own benefit, or not, is doubtful. I do not think it possible for me to fix any value upon them. In order to do so I think the defendant should have shewn definitely and in detail exactly what they are worth. Taking his own story as true, he has been treated with leniency, and I must therefore disallow any such claim. The plaintiff will, therefore, be entitled to judgment for $200 damages, but the costs will be taxed on the lower scale without any set-off on account of the action having been brought on the higher scale.

ALBERTA.

BECK, J. DECEMBER 27TH, 1907.

CHAMBERS.

RE RED DEER MILL AND ELEVATOR CO. STRATFORD MILL BUILDING CO.'S CLAIM.

Company—Winding-up—Claim for Repossession of Goods Sold to Company under Conditional Contract—Contract Purporting to be Made before Incorporation — Time of Execution—Contract Binding on Company—Acceptance of Goods—Giving Promissory Notes for Price—Purchase of Goods Required in Business—Power to Contract without Seal—Judgment against Company for Price—Estoppel—Fixtures—Failure to Register Contract.

Application by the liquidators of the Red Deer Mill and Elevator Co. for an order to determine the rights of the Stratford Mill Building Co. as against the liquidators.

W. E. Payne, for the liquidators.

W. L. Walsh, K.C., for the Stratford Mill Building Co.

BECK, J.:—The company were incorporated under the Companies Ordinance on 28th September, 1905. The objects

f the company are stated in the memorandum of association o be: "To carry on a general elevator business, and also to arry on the manufacture of flour and cereal foods, and generlly to operate a flour and custom mill, and also to own and perate flour and grain warehouses."

The question I have to decide is whether the agreement hich I am about to refer to with particularity is binding pon the Red Deer Company, so as to preserve in the Stratord Company the title to the property described in it.

An original copy of the agreement is filed as an exhibit. It is stated to be "made this 23rd day of September, 905," that is, 5 days prior to the incorporation of the comany, "by and between the Stratford Mill Building Comany and the Red Deer Mill and Elevator Company Limited." y it the Stratford Company "agree to manufacture and urnish at Stratford" certain listed articles of machinery nd apparatus for the price, payable in certain instalments, f $11,500. It contains the following clause: "It is agreed that he property in and the title to the machinery and other rtices heretofore specified shall not pass to the party of the econd part, but remain vested in the party of the first art until all cash, notes, or other obligations given herefor are paid in full." It concludes with these imortant words, to which, however, counsel on either side seem o have adverted, viz.: "In testimony whereof the said parles have hereunto set their hands and seals this 4th day of ctober, 1905," that is, 7 days *after* the incorporation of the ompany. It is signed: "The Red Deer Mill and Elevator ompany Limited, M. McDonald, president (seal), D. W. atten, secretary (seal)."

An examination of the agreement satisfies me that, though tated to be made on 23rd September, it was not in fact exeuted in the name of the Red Deer Company until 4th Ocober.

This is sufficient to dispose of the contentions on the part f the liquidators based on the supposition that the agreeent was executed prior to incorporation; but, had the fact een otherwise, I should have held, as against those contenions, that the company became bound by the agreement, on he grounds that the agreement was made in the name of he company, that they accepted the goods comprised in it, nd gave promissory notes for a portion of the price. The resent case is clearly distinguishable from Re Northumber-

land Avenue Hotel Co., 35 Ch. D. 16, in which it was held the company were not bound, and is a stronger case than Howard v. Patent Ivory Manufacturers Co., 38 Ch. D. 156, in which it was held that the company were bound. In both those cases the contract purported on its face to be made with a party other than the company sought to be bound.

Looking at the list of goods comprised in the agreement, I have no doubt that they are such as the Red Deer Company could properly purchase, as being of the character likely to be required in the business which they were authorized by their memorandum of association to carry on; and, consequently, which could be contracted for without the necessity for the use of the company's seal; though, in the absence of evidence that the company had adopted a special seal, I would hold, in view of the terms of the testimonium clause and the fact of seals being placed after the signatures of the president and secretary, that the agreement is under the company's seal.

It is quite clear, to my mind, that the transaction in question was not a case of the company "borrowing," and that therefore the provisions of the Companies Ordinance in that regard have no application.

It appears that the Stratford Company sued the Red Deer Company for the balance remaining unpaid under the agreement in question, founding the claim upon the agreement, and not upon a quantum meruit; the Red Deer Company appeared and filed a defence. On 21st February, 1907, with the consent of the defendants, an order was made by a Judge striking out the defence, and thereupon judgment was signed. I think this judgment estops the company, and consequently the liquidators, from denying that the company made the agreement, and from contesting its validity on the ground of the absence of any proceedings preliminary to its execution.

It is said that considerable portions of the machinery and apparatus in question have become fixtures, and that thereby the reservation of title in the conditional seller has ceased to be effective. The allegation of fact is supported by no proof.

In my opinion, a chattel sold under the condition that the title shall remain in the seller until payment of the full purchase price, continues to retain its character as a chattel even though so annexed to the soil as otherwise to be a fix-

e, except as against a bona fide purchaser for value with-
notice. See Hobson v. Gorringe, [1897] 1 Ch. 182.

The absence of registration of the agreement is of no con-
uence as between the seller and buyer; the liquidators are
this respect in no different position from the company.

It is contended that by the Stratford Company having
d the Red Deer Company for the purchase price and ob-
ned judgment, the condition retaining the title in the
er is extinguished. I hold the contrary. The position
not different from a mortgagee obtaining judgment upon
mortgagor's covenant to pay.

I think I have dealt directly or indirectly with all the
nts raised by counsel in their argument. The result is
t I hold that the agreement in question is binding in all
pects on the company, and that the liquidators are bound
recognize as a fact that the title to the machinery and ap-
atus in question is in the Stratford Company.

If the liquidators are advised to appeal from my decision,
ill give them such leave as may be necessary to bring the
eal on for hearing at the approaching sittings of the Court
banc.

ALBERTA.

ck, J. DECEMBER 31ST, 1907.

CHAMBERS.

FREEZE v. CAREY.

McKAY v. CAREY.

*hanics' Liens—Actions to Enforce—Jurisdiction of Su-
preme Court of Alberta—Jurisdiction of District Courts
—Amounts Involved — Mechanics' Lien Act—Supreme
Court Act—District Courts Act.*

These two actions were brought to realize mechanics' liens.

In the first mentioned action (in a District Court), J. C.
Bown, K.C., for defendants, moved absolute a summons
et aside the writ of summons and certificate of commence-

ment of proceedings, on the ground that there was no jurisdiction to issue the writ out of the District Court, the cause or matter being one within the jurisdiction of the Supreme Court—the point being that the amount claimed was over $200.

J. R. Boyle, for plaintiffs in the first action, contra.

In the second action (in the Supreme Court), J. C. F. Bown, K.C., for the defendants, moved absolute a summons to set aside the originating summons and the certificate of commencement of proceedings, on the ground that there was no jurisdiction in the Supreme Court to issue the originating summons, inasmuch as the amount claimed was under $200.

J. E. Wallbridge, for the plaintiffs in the second action, contra.

BECK, J.:—I think both applications can be considered together. The decision in either case depends upon the interpretation of certain provisions of the Mechanics' Lien Act (ch. 21 of 1906), the Supreme Court Act (ch. 3 of 1907), and the District Courts Act (ch. 4 of 1907). The Mechanics' Lien Act, sec. 21, provides that in all cases in which the amount claimed by the lien . . . does not exceed the sum of $200, proceedings *may* be taken before the Court or a Judge, in a summary way by originating summons, subject to the provisions in that behalf of the Judicature Ordinance, and such Court or Judge may take accounts, etc.; and, when not otherwise provided, the proceedings shall be, as nearly as possible, according to the practice and procedure in force in the said Court.

Section 23 provides that in all cases in which the amount claimed by the lien . . . exceeds the sum of $200, such lien may be realized in the Supreme Court of the North-West Territories, or such other Court as may hereafter be constituted exercising within the province the jurisdiction, powers, and authority at the date of the passing of this Act exercised therein by the Supreme Court of the North-West Territories in the judicial district in which the land charged is situated, according to the ordinary procedure of that Court.

Section 2, sub-sec. 1, reads: "'Court or Judge' shall mean the Supreme Court of the North-West Territories, or such Court as may hereafter be constituted exercising within the province the jurisdiction, powers, and authority at the date of the passing of this Act exercised therein by the Supreme

ourt of the North-West Territories or any Judge of the id Court or of such last mentioned Court."

The District Courts on their civil side have by virtue of e District Courts Act, secs. 23 and 24, the same jurisdiction is by the Supreme Court Act conferred upon the Supreme ourt, save that it is limited by the words "where the debt damages, claim or demand, does not exceed $400, or where e subject matter involved in any claim for relief or for e enforcement of any right or demand does not exceed 00."

The Supreme Court of Alberta has, by virtue of the Sueme Court Act, all the jurisdiction exercisable by the Sueme Court of the North-West Territories. It has, hower, in one instance at least, by virtue of that Act, a greater risdiction, namely, the jurisdiction to entertain an action criminal conversation: sec. 18.

Section 21 of the Mechanics' Lien Act, taken by itself, pears to me to be intended merely to deal with the question procedure.

It seems to me the question involved in both the applicaons depends upon the meaning of the words in sec. 2, sub. 1, and in sec. 23, of the Mechanics' Lien Act, "or such ner Court as may hereafter be constituted exercising with the province the jurisdiction, powers, and authority at e date of the passing of this Act exercised therein by the preme Court of the North-West Territories."

The Mechanics' Lien Act was passed in 1906; the Sueme Court Act and the District Courts Act, in 1907. In 06 it was, theoretically at least, quite uncertain what Court Courts, and whether one or more Courts, would eventually established in substitution for the Supreme Court of the orth-West Territories. It is conceivable that the system of parate courts of law, equity, probate, etc., might have been verted to. What was in fact done was to establish two ourts, one (as I have pointed out) with greater jurisdiction an the Supreme Court of the North-West Territories; the her with less.

In my opinion, therefore, the words I am considering must taken to mean any other Court hereafter constituted excising, in respect of the class of subjects within which the atter in question falls, the jurisdiction, powers, and authory formerly exercised by the Supreme Court of the North-

West Territories, subject only to the restrictions and limitations imposed upon such Court by its constitution.

This being my view, I hold that the writ of summons in the first mentioned action was properly issued in the District Court, notwithstanding the fact that the amount claimed, while being under $400, was nevertheless in excess of $200, and I hold that there was jurisdiction in the Supreme Court to issue the originating summons in the secondly mentioned action, but, in my opinion, in view of the fact that the amount claimed is not in excess of $400, the originating summons might have been, and would more properly have been, issued in the District Court.

I consequently, in pursuance of sec. 31 of the District Courts Act, order the secondly mentioned action to be transferred to and tried and otherwise dealt with by the District Court of the district of Edmonton, and order that the plaintiff, in the event of success, shall be entitled to District Court costs only.

I have purposely, in order to avoid confusion, reserved my observations upon sec. 22 of the Supreme Court Act, on which considerable stress was laid. That section reads as follows: "The Court shall have generally all the jurisdiction, powers, and authority which prior to the coming into force of this Act was by any law, order, or regulation vested in or capable of being exercised by the Supreme Court of the North-West Territories within the provinces; and where in any statute, Act, or Ordinance, or in any order or regulation made thereunder, reference is made to the Supreme Court of the North-West Territories, or to any Court which may, after the passing of such statute, Act, or Ordinance, be constituted exercising within the province the jurisdiction, powers, and authority at the date of the passing of such statute, Act, or Ordinance, exercised therein by the Supreme Court of the North-West Territories, or by any Judge thereof, such reference shall, after the coming into force of this Act, be taken to mean and to refer to the Court by this Act established or to any Judge of such Court respectively."

I confess to have found this section difficult of interpretation. The conclusions that I have arrived at are these: The first clause (ending with the word "province") and the second clause (beginning with the words "and where") must be dissociated; the first clause is, of course, without prejudice to the partial concurrent jurisdiction of inferior Courts; the

second clause is intended to deal with only the jurisdiction conferred by miscellaneous "statutes, Acts, or Ordinances," or "orders or regulations made thereunder."

The interpretation calls for a further consideration of the question whether sec. 21 of the Mechanics' Lien Act does not provide one only, and that a statutory, method of enforcing a lien for an amount under $200. I have come to the conclusion that the procedure there laid down is merely permissive and not intended to exclude the ordinary method of proceeding by writ of summons, that it is intended to provide a less expensive mode of procedure on liens of a small amount, and that if it be not adopted, any additional costs incurred can be dealt with specially.

The best consideration I have been able to give sec. 22 has, therefore, not led me to change the opinions I had previously come to.

Costs to the plaintiffs in any event.

ALBERTA.

TAYLOR, D.C.J. DECEMBER 31ST, 1907.

CHAMBERS.

ADDISON v. DICKSON.

Attachment of Debts—Practice—Garnishee Summons—Affidavit to Lead—Date of Making—Information and Belief—Grounds of—No Necessity for Stating—Rule 384.

Application by the defendant to set aside a garnishee summons, on the grounds that the affidavit filed upon the application for such garnishee summons did not comply with the provisions of Rule 384, and that the summons was issued upon insufficient evidence.

J. E. Wallbridge, for defendant.

E. B. Williams, for plaintiff.

TAYLOR, D.C.J.:—The first point argued by the defendant's counsel was that the affidavit was irregular because dated 26th November, 1907, while the garnishee summons was not issued until the 30th November.

There is nothing in the Rule to shew that the affidavit should be taken the same day as it is filed, and I would take it that a reasonable time was intended, and I do not think that the 4 days that elapsed between the taking of the affidavit and the issue of the garnishee summons is an unreasonable time.

The next point was that the affidavit was defective in that it did not state the grounds of the plaintiff's information and belief.

The Rule says that the affidavit should state "to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor."

The affidavit in question says: "(2) That I am informed and verily believe that the Canadian Bank of Commerce is indebted to the defendant and that the said Canadian Bank of Commerce is within the jurisdiction of this honourable Court."

This portion of the Rule (prior to 1897) was as follows: "In either case" (referring to issue of garnishee proceedings before or after judgment) "such affidavit, further stating that any other person (naming him) is indebted to such debtor and is within the jurisdiction of this Court, and filing," etc.

This is practically the same as the English Rule—Order 45, Rule 1.

In 1897 the Judicature Ordinance was amended and made the same as it now is.

Under the English Rule in Coren v. Barne, 2 Q. B. D. 249, an affidavit on information and belief was permitted, but the case as reported does not mention that the affidavit stated the grounds of such. In the Annual Practice it states that under the English Rule such grounds of belief are necessary, and to support such this case is cited as well as others of later date.

Had the Rule not been changed, there seems to be no doubt but what it would be necessary to state the grounds of belief. The legislature, however, has changed the Rule, and states that an affidavit on information and belief is sufficient, and does not state that the grounds of belief shall be given. I am of the opinion that it was not the intention of the legislature to make it necessary to give the grounds.

The defendant's counsel cited the case of Salander v. Jen-n, 6 W. L. R. 401, decided by the full Court for the Yukon erritory. That case is on the same point as the one before e, but it seems to me that the learned Judges did not draw e distinction between the English Rule and their own, hich is the same as ours.

I cannot see how it can be compulsory to state grounds of lief when the Rule does not demand the same, and, with l due deference to the learned Judges, I cannot draw the me conclusions as reached by them. The affidavit in the esent case and in that of the Yukon Court practically fol-wed the wording of the Rule.

To support this opinion, I may say that in Rule 295, here affidavits on information and belief are permitted, the ounds of such are to be stated; why then does not Rule 384 ve similar words if such were intended?

It is always difficult for a creditor to get information as what may be owing to a debtor, and in many cases it might a breach of trust to tell who his informant was; and, ould such be required, it would cause those who can give ch information to the creditor to be less accessible than is w the case; should such information be untrue, no harm done to the garnishee or to the debtor, as the creditor ould have to bear any costs occasioned by his taking the oceedings.

I think that such proceedings should be permitted with as tle difficulty as possible.

I therefore refuse the application with costs.

SASKATCHEWAN.

ETMORE, C.J. DECEMBER 2ND, 1907.

TRIAL.

FRY v. TOWN OF INDIAN HEAD.

ntract — Work and Labour — Tender — Specifications — "Estimate or Certificate" of Engineer of Municipal Corporation—Construction of Contract—Costs.

Action to recover moneys due for work performed and aterials furnished under a contract.

W. B. Willoughby, for plaintiff.

N. Mackenzie, for defendants.

WETMORE, C.J.:—I am of opinion that under this contract the matters have been so ably argued before me by both counsel are very clear. No doubt, the agreement is not a very well drawn one, as I have stated before, but, as respects the matters which are involved in the argument which I have heard, I think it is abundantly clear.

The agreement on the part of the plaintiff was to furnish material and certain work in respect to a water supply which was being installed in Indian Head. There was a tender made for the sum of $20,554 for a portion of the work mentioned in the specifications which are attached to the tender. The agreement that was signed provides that the contractor, "for himself, his heirs, executors, and administrators, covenants and agrees with the said corporation, and their successors, to perform and execute the whole of the works mentioned herein and in the said specifications and general conditions, to the satisfaction of the engineer, in strict accordance with the provisions of this agreement." It goes on to provide that the work, including all extras in connection therewith, shall be duly and properly executed, and that the contractor shall keep all the conditions and terms of the contract, and the corporation shall pay him therefor the amounts, at the rates, and in the manner and subject to the drawbacks and penalties, mentioned in the tender. It is provided that no money shall become payable under this contract unless and until an estimate or certificate therefor shall have been signed by the engineer. What does this mean? I consider, according to the terms of the agreement, that it means that no money shall be payable under the contract unless and until an estimate or certificate therefor shall have been signed by the engineer. The trouble is, that the word "or" has been inserted, and I am not going to construe the agreement by doing what is sometimes authorized where the text justifies it, make the alteration in the agreement by substituting the word "and" for "or." It may be called "estimate or certificate," but it must be signed by the engineer in writing. Then the clause goes on, "the possession of which certificate is hereby made a condition precedent to the contractor's right to be paid or to maintain any action for such money or any part thereof." That seems to be a provision that no action can be brought for the money until a certificate or estimate has been obtained therefor. Now, the next clause also provides: "And it is hereby expressly provided that the granting of

any estimate or certificate for the payment of any moneys thereunder shall not be an acceptance." And there is another clause which distinctly recognizes and which contemplates that there is to be an estimate or certificate for the payment of money. A certificate has been signed, but it only provides for the payment of $1,490.72. That amount has been paid, but the certificate does not certify for the payment of the $4,181. I refer again to the provisions of the agreement, to the first clause which I have referred to, namely, that the contractor is to perform and execute the works mentioned therein and in the said specifications and general conditions, to the general satisfaction of the engineer, and then to the provision of the other clause that no money shall become payable under the contract until an estimate or certificate therefor shall be signed by the engineer, "as hereinbefore provided." What is herein provided? It is that the engineer is to certify; and there is a provision that the work mentioned in the specifications and general conditions shall be performed to the satisfaction of the engineer. I think there is a clear inference to be drawn. I agree with Mr. Willoughby that a certificate that work had been done might, if not qualified, involve a concession that the work had been done to the satisfaction of the engineer, but, as a matter of fact, there is not a word in this certificate that the work was done to his satisfaction; on the contrary, on the face of his certificate he holds and sets forth that the party is not entitled to be paid the full amount, but only $1,490.72, and that the rest is to be withheld.

This case can go no further, and there will be judgment for the defendants on the issues joined on the 8th, 9th, 10th, 11th, and 16th paragraphs of the statement of defence, with the general costs of action. I will not give any judgment as to any other paragraphs, because so far as they are concerned they have not been threshed out.

We come to the $126 for materials. The evidence does not satisfy me that this was a debt. He leaves this property, his tools, there in the hands of the defendants, and if any right of action could arise, he should make a demand, and that he has not done. It is covered by the 16th paragraph, on which I have said there should be judgment for the defendants, and what was paid into Court will be paid out to them or their attorney.

SASKATCHEWAN.

LAMONT, J. DECEMBER 11TH, 1907.

TRIAL.

DAYMAN v. MACDONALD.

Landlord and Tenant——Lease, Termination of, on Agreement of Tenant to Purchase Demised Premises—Merger —Intention—Onus—Action for Rent.

Action for rent.

E. L. Elwood, Moosomin, for plaintiff.

D. Mundell, Moosomin, for defendant.

LAMONT, J.:—In this action the plaintiff sues for 8½ months' rent at $12 per month. On 1st June, 1906, the defendant, by verbal agreement, rented certain premises from the plaintiff at $12 per month. About 15th July, according to the plaintiff's testimony, negotiations were entered into for the purchase of the demised premises by the defendant, and an agreement was arrived at whereby the defendant agreed to purchase the property for $650. The plaintiff says that the agreement was that the $650 was to be paid in cash at the end of the month of July. The defendant says it was not to be a cash deal, but that he was to pay as soon as he had effected a sale of some property he had in Mortlack. The plaintiff, about 1st August, executed a transfer of the premises to the defendant, and had the transfer registered and a certificate of title issued in the name of the defendant on 23rd August, 1906. On 1st or 2nd August plaintiff told defendant that the transfer was ready, but defendant did not have the purchase money or any part thereof. Again during the last week of August, after the certificate of title had come, in defendant's name, plaintiff called on defendant with the certificate and asked for payment, but defendant still had no part of the purchase money, and it was not until 19th October, 1906, that defendant made any payment on account of the purchase money. On that date he paid $50. The

balance of the purchase money he paid as follows: 9th November, $200; 18th December, $100; 11th March, 1907, $100; and 3rd April, 1907, $200. The defendant paid the rent for June and July. 1906. No mention was made of rent by the plaintiff to the defendant until 3rd April, 1907, when the final payment of purchase money was made. On that occasion the plaintiff asked the defendant if "there was not some rent or some interest coming to him." The defendant said there was not. Plaintiff then sues for rent from time agreement for purchase was made until time of final judgment.

Plaintiff's counsel contends that the sale was to be a cash sale, and therefore the property was not the defendant's until the final payment was made on 3rd April, 1907; that the transfer was executed and registered on the faith of the defendant's promise to pay at the end of July, 1906; and that in any case the plaintiff is entitled to rent until 19th October, when the first payment of purchase money was made.

I do not think this contention is well founded. It is a well-settled principle of law that where the lessee of premises acquires the freehold in the same right as he holds the lease, there is a merger of the lease in the fee, unless an intention is in some way expressed that no merger is to take place, and the onus of proving such intention rests on the party contending that there has been no merger.

The execution of the transfer at the beginning of August, and the subsequent registering of the same in the defendant's name, coupled with the fact admitted by the plaintiff that after the making of the agreement he had not asked the defendant for any rent until the final payment had been made, raises a strong presumption that the intention of the parties was that the lease should be at an end on the execution of the transfer, and this presumption the plaintiff has not displaced.

The defendant paid the rent for the months of June and July, and, as I find that he became the owner of the premises on 1st August, 1906, there will be judgment for the defendant with costs.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 21ST, 1907.

CHAMBERS.

SASKATCHEWAN AND BATTLE RIVER LAND AND DEVELOPMENT CO. v. HUNTER.

Writ of Summons—Service out of Jurisdiction—Action for Price of Land Sold—Contract — Performance—Place of Payment — Breach within the Jurisdiction — Previous Breach without the Jurisdiction.

Motion by the defendonts Hunter, McMillan, Irving, and Aiken, to set aside an order permitting service upon them in Ontario of the writ of summons in this action.

W. B. Scott, Regina, for the applicants.

J. A. Allen, Regina, for the plaintiffs.

WETMORE, C.J.:—The plaintiffs obtained an order for service of a writ of summons ex juris on the defendants in the province of Ontario. This order was made on the affidavit of one Norton, the president of the plaintiffs, which alleged, among other things, that the breach of agreement in respect of which this action was brought took place in the town of North Battleford, Saskatchewan. The defendants Hunter, McMillan, Irving, and Aiken now apply to have the order for service of the writ on them set aside. The statement of claim describes the plaintiffs as of the town of North Battleford, in the province of Saskatchewan, and alleges that they have their head office in that town. The action is brought to recover the price alleged to be payable in respect of lands sold by the plaintiffs to the defendants. These moneys were payable by instalments, and the claim alleges that the instalments in question were agreed to be paid at North Battleford. The defendants who now apply were served in Ontario in pursuance of the order for service before referred to. The affidavit of one Marshall was read on behalf of the defendants, and it is alleged that there was no agreement between the plaintiffs and the defendants that the purchase money should be paid at North Battleford. On the other

hand, the plaintiffs produced an affidavit of one Brown, secretary-treasurer of the plaintiffs, who swore that the cash payment mentioned in the agreement was to be made to the plaintiffs at North Battleford, and that there was a distinct agreement between himself, acting for the plaintiffs, and the defendants, on the night that they signed the agreement, that the defendants should the next morning deliver to him a cheque marked "good," payable to the plaintiffs at par in North Battleford, and he was to deliver it to the plaintiffs there, and that the agreement as to future payments provided that the same should be paid to the plaintiffs at North Battleford and not elsewhere. The statement of claim purports to set out the agreement in question at length, and there is no express allegation in it that any of the payments were to be made at North Battleford. The language of the agreement with respect to payment is as follows: "Terms of payment: $100 per lot, viz., $6,000, one-fourth cash, and balance of purchase money to be paid in 4, 8, and 12 months, interest at the rate of 6 per cent. per annum to date from the 1st January, 1907. (The lots mentioned above are situated in the east half of section 15, township 53, range 24, west of the 4th M., known as Santa Rosa). If any of the above mentioned lots are sold prior to the date of this purchase, the money paid by the purchasers shall be held by the vendors pending the decision of the purchasers to re-selection or to have the balance of the money returned."

I take it that the allegations in the statement of claim with respect to the agreement requiring the payments to be made in North Battleford are merely a conclusion of mind on the part of the pleader. On the other hand, the affidavit of Mr. Brown fails to establish to my satisfaction that the payment of the cash instalment provided for in the contract, or any other instalment, was by the agreement expressly made payable at North Battleford. The question that now arises is: is this action founded on any alleged breach within the jurisdiction of the contract which according to the terms thereof ought to be performed within the jurisdiction? No hard and fast rule can now, I think, be laid down under the authorities—every case must depend upon its own circumstances, and according to what is laid down by Cotton, L.J., in Reynolds v. Coleman, 36 Ch. D. at p. 464, "You must look at the contract and at the facts which existed at the time when the contract was made, and then determine whether—

having regard to the terms—the contract was one which ought to be performed within the jurisdiction." This rule has been cited with approval in a number of cases, among which I will draw attention to the remarks of Lindley, L.J., in Rein v. Stein, [1892] 1 Q. B. at p. 757.

The contract in question was made at Orangeville, Ontario, and the first payment, namely, one-quarter of $6,000, was to be made in cash. I understand that to mean cash down. It was, therefore, the intention of the parties that according to the agreement this payment should be made right there at Orrangeville, where the contract was made. The arrangement referred to by Mr. Brown as to giving a cheque marked "good," payable at North Battleford, was a means merely by which the payment could be effected or considered effected. It did not alter the agreement. I presume this cheque never was given, or, if it was given, it was dishonoured; at any rate the action has not been brought upon the cheque, it has been brought upon the agreement, and one of the breaches alleged in the action is the omission to pay this first instalment. As to that instalment I hold that there was no breach within the jurisdiction. The next alleged instalment fell due, according to the agreement, on 13th May last, and it is alleged was not paid. Now the question arises: where was the place for the payment of that instalment? I am of opinion that that instalment was to be paid at North Battleford. That is a case that comes within the ordinary rule laid down by Lord Esher, M.R., in The Eider, [1893] P. at p. 131, that "where there is no place specified in the contract for the payment the debtor must follow his creditor and must pay where his creditor is." In this case the creditor was at North Battleford. I do not think it is necessary to further discuss that question than to refer to the very elaborate and carefully prepared judgment of Mathers, J., in Gullivan v. Cantelon, 5 W. L. R. 469, who has exhaustively dealt with this question and has arrived at the conclusion which I have just enunciated. The difficulty that has presented itself to my mind is the fact that one breach of the contract having occurred at Orangeville, in Ontario, and the other breach at North Battleford, in this province, whether, under such circumstances, the order for service ex juris was properly made. I have come to the conclusion with some hesitation that the order was properly made; that there being a breach within the jurisdiction, it

would be open to the plaintiff to claim also for a breach made without the jurisdiction, especially as in this case both breaches were the omission to pay moneys alleged to be due under the same contract.

This application, therefore, must be dismissed with costs. The defendant to have 20 days within which to file a defence.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 21ST, 1907.

CHAMBERS.

RE RIDDELL.

Land Titles Act—Transfer of Land—Certificate of Title—Memorandum Indorsed on—Merger or Extinguishment of Mortgage Assigned to Transferee.

Reference by the registrar of land titles under sec. 159 of the Land Titles Act (Provincial).

E. L. Elwood, Moosomin, for Lavinia Riddell.

D. Mundell, Moosomin, for Reeves & Co. and C. & E. A. Dahlquist.

WETMORE, C.J.:—The facts are as follows. One Paul A. Konschur was the registered owner of the south half of section 22, township 2, range 3, west of the second. On 8th September, 1903, he executed a mortgage to the Mutual Life Assurance Company of Canada for $2,000, which was registered on 5th November, 1903; subsequently and prior to 4th April, 1906, he mortgaged the property to Reeves & Co., and several executions were registered against the property, among others an execution by Riddell & Co., in which concern Lavinia Riddell is interested. On 4th April, 1906, Konschur transferred this property to Lavinia Riddell. On 4th June, 1906, the Mutual Life Assurance Company of Canada assigned their mortgage to Lavinia Riddell. The transfer and assignment last mentioned were registered on 10th September, 1906, and a certificate of title of that date was issued by the registrar to Lavinia Riddell.

It was contended on behalf of Riddell that the registrar should indorse on the certificate of title issued to her a memorial of the mortgage to the life assurance company and of the transfer by them to her. It was argued on the other hand by the mortgagees Reeves & Co. and the intervening execution creditors that the mortgage to the assurance company by the transfer of it to Riddell became merged.

I am not prepared to say that there was a merger, but I am of opinion that the intention of the Land Titles Act in force at the time Riddell got the transfer and assignment in question was, in so far as she was concerned, to cause the mortgage to be extinguished.

The Act in force at the time of this transfer and assignment and registration was the Land Titles Act, 1894 (Dominion). Section 65 of that Act provides as follows: "In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee, that is to say: That the transferee will pay the principal money, interest, annuity, or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor." That section shews, I think, very clearly that the intention was to protect the transferor from any covenants that might be contained in any mortgage or incumbrance upon the land existing at the time of the transfer. Now, I take it that this property is not sufficient to satisfy the incumbrances upon it if the mortgage to the assurance company is allowed to stand, because, if it was, I can see no object in testing the question which has been raised in this case. That means this: if Riddell is allowed to keep alive the mortgage of the assurance company, she would leave the subsequent mortgagees and execution creditors without remedy against the land, and cast the burden upon the transferor (Konschur) of paying what was due in respect to such mortgages and incumbrances; and this section seems to me to point directly to the fact—possibly not that there is a merger, but—that the transferee is expected to pay these incumbrances off, and, if he pays an incumbrance off or takes an assign-

ment of it, which is the same thing, he is only carrying out what the section contemplates he should do, and therefore that he cannot use such payment or transfer to prejudice the rights of other mortgagees or incumbrancers whose securities the Act intends he shall pay off.

I am, therefore, of opinion that the Registrar of land titles was correct in refusing to indorse on the transfer to Lavinia Riddell a memorial of the mortgage to the assurance company and the assignment thereof to her. The Registrar of land titles will be so advised, and Lavinia Riddell must pay the costs of Reeves & Co. and C. & E. A. Dahlquist in connection with this application.

SASKATCHEWAN.

NEWLANDS, J. DECEMBER 23RD, 1907.

TRIAL.

HOPKINS v. DANROTH.

le of Goods—Contract—Vendor Re-taking Possession—Action for Balance of Price—Rescission—Credit Given for Value of Goods.

The plaintiff sued on two instruments by each of which the fendant promised to pay him the sum of $250. These inruments were dated 24th November, 1902, and payable on t December, 1903 and 1904, respectively. They were given r one Sawyer-Massey 17 horse power portable engine. It as provided in the instruments that the title, ownership, and ght to possession of this engine was to remain in the plainff, and if default were made in payment, the plaintiff might mediately take and hold possession of the same until payent, or sell the same by private or public sale, and apply the t proceeds towards the payment of the amount due, and llect the balance from the defendant. Certain payments re made, amounting in all to $141.50, with which the plainf had credited the defendant. In June, 1905, the amount e not having been paid, the plaintiff re-took possession of engine, had it repaired at an expense of $25, and en-

deavoured to sell it, which he was unable to do, and still retained possession of it. In the action he credited the defendant with $275, which he said was the value of the engine, less the amount paid for repairs, and claimed for the balance due. The defendant set up those facts as a defence and also counterclaimed for the value of the engine, which he alleged was, at the time of the retaking, $600.

J. A. M. Patrick, Yorkton, for plaintiff.

Parker, Yorkton, for defendant.

NEWLANDS, J.:—At the trial evidence of the facts (as above stated) was given, and the defendant argued, on the authority of Harris v. Dustan, 1 Terr. L. R. 404, and Massey-Harris Co. v. Lowe, 1 W. L. R. 213, that the original agreement is rescinded, and that plaintiff cannot recover. The facts of this case are different from the facts of either of those cases. It differs from Harris v. Dustan in that there is a provision here for retaking the property and retaining the same until the amount due is paid, and there is no evidence that the engine was not properly cared for by the plaintiff, as in that case; and from Massey-Harris Co. v. Lowe in that plaintiff has the right of resale and may sue for the balance due thereafter. I do not think that either of these cases apply, or that the contract here has been rescinded, as was held in those cases.

Besides, the parties have by their pleadings assumed that plaintiff shall retain the possession and ownership of the engine, and credit the defendant with its value, the real question in dispute being the value to be put on the engine. On this point there is only the evidence of the parties, the plaintiff swearing that its value at the time of taking was $275, and the defendant that it was at that time worth $600. Neither party appears to be an expert in engines, nor did I see any reason at the trial why more credit should be placed on the testimony of the one than on the other. I will, therefore, split the difference between the two, and find the engine to be of the value of $437.50 at the time it was re-taken by the plaintiff.

The plaintiff will have judgment for $500 and interest as specified in these instruments after crediting the amounts paid and the sum of $437.50 as from 15th June, 1905, and costs on the lower scale.

SASKATCHEWAN.

NEWLANDS, J. DECEMBER 23RD, 1907.

TRIAL.

MUND v. BUSCH.

Covenant—Restraint of Trade—Sale of Business—Agreement of Vendor not to Enter into Competing Business—Absence of Consideration — Agreement Made after Completion of Sale.

The plaintiffs alleged that the defendant sold them his business in Langenburg, including the goodwill thereof, and agreed that he would not start up in business in Langenburg in opposition to the plaintiffs while they were engaged in carrying on the business purchased from the defendant in that place; that the defendant, during the time they were so carrying on business, commenced to carry on the business of a general merchant at Langenburg aforesaid, in breach of the agreement, whereby the plaintiffs suffered damage.

The defence was that at the time of the agreement to sell his business to plaintiffs the defendant did not agree not to enter into business as alleged, but that the agreement was made after the agreement for the purchase was carried into effect, and was without any consideration.

Parker, Yorkton, for plaintiffs.

W. F. McLean, Yorkton, for defendant.

NEWLANDS, J.:—The negotiations between the parties were commenced by the following letter from defendant to one of the plaintiffs:—

"Langenburg, N.W.T., Jan. 26th, 1907.

"Gotlieb Mund, Esq.,

"Beresina.

"Dear Sir,—I made up my mind to sell to you my share and rights to or of this business here in Langenburg for

the sum of $2,647.08. As payment I will take the outstandings as the books shew till Jan. 9th, 1905, $2,289.48, and for the balance $356.80, for which sum I will take a note from you payable 18 months from when it's drawn, with interest at 6 per cent., providing you and whoever you take in with you take over all the liabilities of the said business, which are to be as shewn on a sheet accompanying this letter. Should they be more, it is understood that they will be paid out of my note given by you. Should they be less, then you pay me the balance.

"Yours truly, Wm. Busch."

The agreement was afterwards put into writing as follows:

"Langenburg, Assa., Jan. 30th, 1905. I, William Busch, hereby agree to sell to Mund & Schneider all my interest in the firm of William Busch & Company, being the amount owing me by said firm, viz., $2,647.08, and I agree to take for said amount the said sum as follows: $2,289.48 in book debts owing the said firm, and the balance, $357.60, for which I am taking note from you, Jacob Schneider, payable 18 months after date at 6 per cent. per annum, you and Gotlieb Mund assuming all the liabilities of the said firm, and relieving the said William Busch & Co. of all liability in connection with the said firm, providing the said liabilities do not exceed the sum of $6,033.52; and I, Jacob Schneider, agree to pay all liabilities on behalf of the said Mund & Schneider, and relieve and save harmless the said William Busch from all liabilities in connection therewith.

"Jacob Schneider.
"William Busch & Co."

The plaintiff Schneider says that at the time this agreement was entered into it was a term of it that defendant should not enter into the business of a general merchant at Langenburg during the time the plaintiffs were in business there. The plaintiff Mund also gives evidence to the same effect, but, as his evidence was given through an interpreter, and as all the business was done by the plaintiff Schneider, his evidence by itself was unsatisfactory, and amounts to no more than that the sale of the goodwill was spoken of before the agreement was signed. The de-

endant emphatically denies that any mention was made efore the signing of the agreement that he was selling ne goodwill also, and he says that he did not agree not to nter into business at that time. Now, as the plaintiffs re trying to add an oral term to a written agreement, I hink that can only be done by clear and unequivocal testiony, and, as we have in this case only the evidence of one laintiff as to this new term, and as that evidence is flatly ontradicted by the defendant, I must find that it is not roven.

On 8th July, 1905, the following receipt was given by ne defendant to plaintiffs: "Langenburg, N.W.T., Feb. th, 1905. Received from Mund and Schneider a full settlelent for my share on store, Langenburg, and I agree never o start a store in Langenburg or run any opposition against ne said new firm while they are in existence. William usch."

As I have found that this agreement on the part of the efendant not to start a store at Langenburg was not a erm of the original agreement, it is a mere naked promise n defendant's part, and is not supported, in my opinion, y the original consideration, and cannot, therefore, be enorced.

There will be judgment for the defendant with costs.

SASKATCHEWAN.

EWLANDS, J. DECEMBER 26TH, 1907.

CHAMBERS.

GESMAN v. CITY OF REGINA.

leading — Statement of Defence — Motion for Leave to Amend Statement of Defence—Withdrawal of Admission —By-law of Municipality—Want of Notice of Action.

Motion by defendants for leave to amend their stateent of defence by adding other grounds of defence, re-

ferred by the trial Judge to a Judge in Chambers, and argued before NEWLANDS, J.

F. W. G. Haultain, K.C., for defendants.

T. S. McMorran, for plaintiff.

NEWLANDS, J.:—In the first place, defendants wish to withdraw an admission of certain facts alleged in paragraph 5 of the statement of claim. Before an admission made on the pleadings can be withdrawn, there should be evidence produced that it was inadvertently made, and that the admission is not correct. No such evidence is produced in this case, and, as a matter of fact, the proceedings that are stated in paragraph 5 to have been taken were so taken before me as a Judge of this Court, and could not be successfully denied, and I therefore refuse to allow defendants to withdraw that admission.

The next amendment sought to be made is to plead a by-law of the city of Regina, under which, it is alleged, the acts complained of were done. The real question in dispute in this action is the right of the defendants to close a certain street in the city of Regina, and defendants should be allowed to so amend their pleadings as to raise all questions touching this issue, and if the street was closed under that by-law, the defendants should be allowed to plead that by-law, and leave to do so is granted.

The defendants next seek to raise the defence that no notice in writing of the plaintiff's intention to bring this action has been given to defendants, as required by sec. 307 of the Regina charter. Now, as I have said, the real issue in this case is the defendants' right to close a certain street; this plea which is now sought to be pleaded does not touch upon this issue, but only on plaintiff's right to bring the action. It is a technical defence which plaintiff can get over by discontinuing, giving the required notice, and commencing his action anew, and is not one which I think should be allowed at this stage of the proceedings. Defendants will not, therefore, be allowed to plead want of notice.

Costs to plaintiff in any event.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 28TH, 1907.

CHAMBERS.

PARK v. LONG.

Dominion Lands Act—Mortgage of Homestead before Recommendation for Patent—Invalidity—Subsequent Mortgage —Validity—Decree for Sale—Costs.

Originating summons for foreclosure of certain mortgages.

A. L. Gordon, Regina, for the plaintiff.

T. D. Brown, Regina, for the Sylvester Manufacturing Company.

T. S. McMorran, Regina, for the International Harvester Company.

WETMORE, C.J.:—The defendant Long executed to the laintiff on 24th February, 1904, a mortgage on the southest quarter of section 2, township 17, range 2, west of e 2nd, to secure $200. This mortgage was registered on th March, 1905. On 3rd April, 1905, the defendant ng mortgaged the same property to Asle Pederson to ure the sum of $205, which last mentioned mortgage was gistered on 10th May, 1905, and was subsequently asgned to the plaintiff. Subsequent to the registration of he first mentioned mortgage, namely, on 22nd April, 1905, he Sylvester Manufacturing Company registered an execuion against these lands in a suit brought by them against ong.

The plaintiff has proceeded by originating summons to oreclose the mortgages of 24th February to him and of 3rd April to Pederson.

At the time that these mortgages were executed, the nly right which the defendant Long had in the property was a homestead entry. It is contended that a patent not having issued for the land, and that Long not having been recommended for a patent or received a certificate to

that effect, as provided by the Dominion Lands Act, the mortgages were void. The plaintiff was cross-examined upon his affidavit upon which he obtained the originating summons, and he swore that a recommendation had been made for a patent to issue, but he stated that in a general way. An affidavit was produced on behalf of the defendant Long, who swore specifically that the certificate of recommendation issued to him was dated 13th January, 1905, and was countersigned at Ottawa on 31st January, 1905, as appeared by such certificate. The plaintiff having sworn in the general way he did as to the issue of this recommendation, and the defendant having specifically stated the date of the recommendation, and no objection being raised to the character of the testimony, I must accept what the defendant has sworn to, and hold that at the time of the execution of the mortgage of 24th February, 1904, the mortgagor, Long, did not hold a recommendation for his patent to issue.

The question now arises: Is this mortgage void? I must deal with the question under the laws in force at the date of the execution of the mortgage, and of the registration thereof. At that date sec. 42 of the Dominion Lands Act had been repealed and a new section substituted by 60 & 61 Vict. ch. 29, sec. 5. That section provides as follows: "Unless the Minister otherwise declares, every assignment or transfer of homestead or pre-emption right, or any part thereof, and every agreement to assign or transfer any homestead or pre-emption right, or any part thereof, after patent obtained, made or entered into before the issue of the patent, shall be null and void; and, unless the Minister otherwise declares, the person so assigning or transferring or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right, and shall not be permitted to make another homestead entry; provided that a person whose homestead or homestead and pre-emption have been recommended for patent by the local agent, and who has received from such agent a certificate to that effect, in the form K in the schedule to this Act, countersigned by the Commissioner of Dominion Lands, or, in his absence, by a member of the Dominion Lands Board, may legally dispose of and convey, assign, or transfer his right and title therein; and such person shall be considered to have received his certificate upon the date upon which it was so

ıntersigned." A clause had also been added to sec. 73 the Land Titles Act, 1894, by 61 Vict. ch. 32, sec. 9, ich is as follows: "Nothing in this Act contained shall title a settler who is entered for a homestead or home-ad and pre-emption under the provisions contained in the ominion Lands Act, to mortgage the land entered for by n as a homestead or pre-emption prior to issue of a pat-t to him therefor, or until he has been recommended r patent by the local agent, and has received a certi-ate of recommendation in accordance with the provisions the said Act; it being hereby declared that, notwith-anding anything contained in this Act, such mortgage in the nature of the assignment or transfer which is rohibited by section 42 of the said Act; and for the pur-ose of preventing the acceptance and registration of any ıch mortgage, the registrar is hereby empowered to refuse) register any mortgage for land for which the patent is ot of record in the land titles office, unless the applicant or the registration of such mortgage first satisfies the egistrar that he is entitled to execute such mortgage, by n affidavit in the form AA in the schedule to this Act, nd to be filed by the registrar with the mortgage if the tter is accepted and filed or registered by him."

I discussed the question which arises under this legisla-on in Flannaghan v. Healey, 4 Terr. L. R. 391, and I held at the agreement in question in that case was void. I ink possibly, however, I put my judgment in that case on wrong ground. I held that sec. 42 had the affect of void-g the contract because the subsequent legislation in 1898 dicated the construction which Parliament placed on sec. 2 of the Dominion Lands Act. I am inclined to think at was erroneous, because a subsequent Act of Parliament ght not to be construed to put a construction on previous gislation unless the Act by clear and express language dicates the intention to put a construction on the pre-ous Act. I ought to have held, and I hold now, that the ctions of the Acts of 1897 and 1898, taken together, have e effect of rendering a mortgage void unless a patent has en issued or unless the recommendation has been issued provided in the Act of 1897. Section 5 of 58 & 59 Vict. ı. 34 does not affect this question, because the mortgage question was made after the enactment of that clause. therefore hold the mortgage of 24th February, 1904, void.

The registration on 29th March, 1905, cannot affect the question, and I am unable to imagine how it came to be registered, in view of the provisions of the Act. As to the other mortgage, executed in favour of Pederson, that is within the Act. The recommendation, according to the defendant Long's own shewing, had issued at the time that that mortgage was made. I will make no decree, therefore, with respect to the mortgage of 24th February, 1904, but I will order the property to be sold under the mortgage made in favour of Pederson, upon the International Harvester Company paying the expenses of such sale or their solicitor undertaking to do so. This sale, however, will be subject to the executions of C. R. Boultbee against Long and of the execution issued by the Sylvester Manufacturing Company against Long.

The plaintiff will have the general costs of this application, but he must pay the costs of the Sylvester Manufacturing Company of opposing the application, in so far as the mortgage of 24th February, 1904, is concerned. There will be no costs to the company with respect to the cross-examination of the plaintiff on his affidavit; that cross-examination served no useful purpose whatever in so far as the company were concerned. The affidavit of Long covered the ground.

A copy of this decree must also be served on the Confederation Life Association, who hold a subsequent mortgage on the property, and who have not been made parties to the suit.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 30TH, 1907.

TRIAL.

H. W. LAIRD CO. v. ADAMS.

Guaranty—Letters—Construction—Consideration — Statute of Frauds.

Action upon a guaranty.

J. F. L. Embury, Regina, for plaintiffs.

Y. T. Frame, Regina, for defendants.

WETMORE, C.J.:—This action, in so far as the defendant Adams is concerned, was brought upon an alleged guaranty given by him to the plaintiffs for the price of goods sold and delivered to the other defendant Bailey. Bailey, wishing to purchase a small stock of confectionery, applied to the plaintiffs, who are wholesale dealers. The plaintiffs thereupon wrote the following letter to the defendant Adams:

"February 14th, 1907.

"R. Adams, Esq., Indian Head.

"Dear Sir:—Mr. W. R. Bailey, of Wolseley, has called upon us to-day and placed an order with us for confectionery stock. Mr. Bailey informs us that you are backing him up financially, and asks us to write to you to this effect. Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us. We may state Mr. Bailey has placed a very modest order with us, and thanking you in advance, we are, yours truly,

"The H. W. Laird Co. Ltd."

In answer to this, Adams, on 15th February, wrote the following letter, which was received by the plaintiffs the following day:

"Indian Head, Feb. 15th, 1907.

"Mr. W. H. Laird & Co.,
"Regina, Sask.

"Dear Sir,—Yours received to-day asking me about Mr. Bailey. Yes, he is honest, a good business man. I have backed him before and no trouble. I am willing to help him any time on his papers. Yours truly,

"R. Adams."

On the strength of this letter the plaintiffs let Bailey have the confectionery to the value of $261.20. The same day that the plaintiffs received this last mentioned letter they wrote to the defendant Adams as follows:

"February 16th, 1907.

"R. A. Adams, Esq., Indian Head.

"Dear Sir:—Your favour of February 15th is received. We thank you very much for your information, and beg to state that we hold a high opinion of Mr. Bailey, and, as you mentioned to us that you were backing him up, it was

for our own information, instead of applying to our commercial agencies, that we thought it better to write you direct.

"Thanking you, we are, yours truly,

"The H. W. Laird Co. Ltd."

I do not look upon this last communication as of any consequence, because I am of the opinion that the rights of the parties must turn upon the letters of 14th and 15th February.

The law on the question turns on the construction that is to be put upon Adams's letter. It was urged that this letter was ambiguous, and that in order to bind a defendant by contract of guaranty the language used must express clearly an intention to take on himself the liability of surety, and if the writing falls short of that, or if the expressions used are doubtful or ambiguous, no contract of guaranty arises: and for this was cited Bank of Montreal v. Munster Bank, Ir. R. 11 C. L. at p. 55. What was laid down in this case undoubtedly supports the defendants' contention, and is in accordance with what was laid down by Bailey, B., in Nicholson v. Paget, 1 C. & M. 48, but later English authorities lay down a different rule. In Wood v. Priestner, L. R. 2 Ex. 66, the Court dissented from the opinion expressed by Bailey, B., and laid it down that a contract of guaranty should be read in the same way as any other contract, and that appears to be the rule of construction at the present time.

It was also urged that the defendant did not guarantee payment of the amount; that his letter did nothing more than assert his willingness to guarantee the amount. Two cases were cited in support of that, McIver v. Richardson, 1 M. & S. 557, and Kastner v. Winstanley, 20 C. P. 101. The facts in McIver v. Richardson are very different to what they are in this case. In that case no request had been made on the alleged guarantor by the plaintiffs, as was made in this case by the plaintiffs' letter of 14th February. So in Kastner v. Winstanley there was no request made, and each of the alleged guaranties in the cases cited, without such a request having been made, could very properly be construed as not a guaranty but an expression of willingness to guarantee.

I must say that I have had very great difficulty in coming to a conclusion in this case. The reply of the defendant Adams is of a most ambiguous character. I think that the learned counsel for the plaintiffs put the question very fairly when he stated that the whole question was what was intended by the word "Yes" in Adams's letter? It is true there is only one question asked in the plaintiffs' letter of the 14th February, and that is to let the plaintiffs know by return mail if he (Adams) would hold himself responsible for Bailey's account; but the "Yes" is open to the construction that it is an answer to the plaintiffs' inferential question whether Bailey was correct in informing them that Adams was backing him up financially. Construing the two letters according to the ordinary rules of construction, I should put such a construction upon them as not to render their act void. In Steel v. Hoe, 14 Q. B. 431, Patteson, J., at p. 446, lays it down that in construing an agreement there is a presumption "that the parties did not intend that their act should be void," and in Wood v. Priestner, cited before, Bramwell, B., lays it down at p. 71: "There is a presumption against the defendant giving an invalid document or the plaintiff receiving it." Applying this rule of construction, therefore, I have come to the conclusion that the word "Yes" is an affirmative response to the plaintiffs' request as to whether he (Adams) would hold himself responsible for Bailey's account.

It was contended that there was no consideration for the greement. I think there clearly was, and the consideration is expressed in the two letters. There is the reuest on the part of the plaintiffs to know whether he ould hold himself responsible, and Adams's reply that would, and on the strength of that the goods were dered. I hold that to be quite sufficient. It was urged, wever, that because the plaintiffs' letter stated that ailey's order was a modest one and did not state the ount, that would relieve Adams from liability. I am of e opinion that it does not. I should take the order — 261-20—to be a modest one for a dealer to order from a holesale merchant.

It was further contended that this agreement was void nder the Statute of Frauds, principally because it did not ontain the amount of the order. I am of the opinion that hat is not correct. You will find case after case in the

books where the guaranty is held to be binding although the amount purchased was not stated or ascertained.

I doubt if I am at liberty to resort to extrinsic testimony for the purpose of arriving at what the parties intended by their written documents. If I were at liberty to do so, Adams's own testimony, put in without objection, was in effect that he meant by his letter that he was willing to back Bailey for the trifling order that the plaintiffs mentioned in their letter. On the other hand, it is rather a peculiar phase of the case that one would never imagine from the plaintiffs' letter of 16th February that they ever thought that they asked for or obtained a guaranty. That letter would simply lead one to the conclusion that the plaintiffs merely believed that they had written Adams for some information as to the financial standing of Bailey. However, I put Adams's testimony referred to and this last mentioned letter out of consideration in arriving at the conclusion I have reached; and have come to that conclusion by construing the two letters of 14th and 15th February, according to what I conceive to be the proper rules of construction.

There will be judgment for the plaintiffs for $261.20 and costs.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 20TH, 1907.

CHAMBERS.

RE KEATING AND OLSEN.

Land Titles Act—Transfer by Executor—Powers of Executor—Personal Estate—Partnership Lands—Judgment in Partnership Action.

Submission by the registrar, under the provisions of the Land Titles Act, as to whether or not he should register a transfer from Albert Vincent Keating, executor, to Olaf Olsen, of an undivided half interest in lots 4 and 5 in block H-G, in the Harper estate of the townsite of Dawson, and an undivided half interest in lot 9, block A, in the Laduc

estate of the townsite of Dawson, as shewn on a plan made by James Gibbons, D.L.S., and of record in the Department of the Interior as plan No. 8338.

CRAIG, J.:—Some time ago the registrar made a verbal submission to me in this matter, at the same time presenting to me letters probate of the will of Andrew J. W. Keating, deceased, by which the administration of the personal estate of the deceased was granted to the executor. The question then submitted was whether under that will the executor had power of disposition over the real estate, and I answered that he had not, on the facts then presented to me. It seems now from the submission presented and from the argument of counsel that the question was mainly as to the form of letters probate, in that the probate only granted administration of the personal estate. This probate was granted in British Columbia, and under our Act was resealed here and issued as probate from this Court. The form there in use is the form which would be used in this territory, we following the laws of England. The form is quite sufficient and proper, and would give the executor power to dispose of such real estate as would devolve upon him as personalty, as executor. It appears that in this matter the real estate in question was partnership property, bought with partnership funds, by the deceased Keating and Olsen, and a law suit was brought by the executor of Keating against Olsen for a partition and an accounting, and in that law suit a judgment was rendered directing a certain disposition to be made of the real estate, which appears by the judgment accompanying this answer. By that judgment it was directed that an account should be taken of the partnership; certain interests were declared to be in the parties to the suit; it was directed that a certain appraisement should be made of certain properties, real estate, including the lots in question; and that the defendant Olaf Olsen should have the first right or option to buy any or all of the said parcels at the appraised value. Olsen has exercised that option in writing filed in Court, and it is to effectuate and carry out that option that this transfer is made. It is quite clear that real estate bought with partnership funds is, as between the partners and the representatives, personal estate: see Lindley on Partnership, p. 1; also Morrell on Executors, p. 92. Apart from that,

there is the judgment of the Court and the order directing sale.

Under these facts there will be a direction to the registrar to accept and file the probate tendered and to record the transfer and issue certificate to Olaf Olsen, first, however, entering and registering the certified copies of the judgment and exercise of option mentioned.

YUKON TERRITORY.

CRAIG, J. DECEMBER 11TH, 1907.

TRIAL.

ALLMAN v. YUKON CONSOLIDATED GOLD FIELDS CO.

(TWO ACTIONS.)

Master and Servant—Dismissal of Servant—Justification—Incompetency — Contract of Hiring—Provision Making Master Sole Judge—Exercise of Power of Dismissal for Cause and without Fraud or Caprice—Bonus.

Actions by William Allman and Arthur Allman (sometimes known as H. West) to recover damages for the wrongful dismissal of plaintiffs from the employment of defendants.

Joseph A. Clarke, for plaintiffs.

H. S. Tobin, for defendants.

CRAIG, J.:—On the trials of these actions it was agreed that the evidence taken in the first case should, so far as applicable, be read and used in the second case. The actions were really tried together, although separate records were filed and separate issues raised; but the pleadings in both cases are precisely the same. The evidence is so involved that the arrangement was almost a necessary one. William Allman's case was tried first, and Arthur Allman's immediately afterwards.

The plaintiffs were engaged under an agreement which I here set out in full:—

"This agreement made this 25th day of May, 1907, at Vancouver, British Columbia, between H. West, of Vancouver, British Columbia, the party of the first part, hereinafter called 'the employee,' and Yukon Consolidated Gold Fields, a New Jersey corporation, party of the second part, hereinafter called 'the employer.'

"Witnesseth: Whereas the second party contemplates the construction of certain mining plants and the opening, development, and operation of certain mines in British Columbia, Yukon Territory, and Alaska, and for such work will require the services of skilled mechanics and labourers.

"And whereas the first party, the employee, represents himself as a carpenter competent to assist in the construction of dredgers, mining plants, the installation of machinery, and the erection of buildings and other structures.

"Now this agreement witnesseth: In consideration of the wages hereinafter agreed to be paid, the employee agrees:

"(1) To perform such work as may be required of him in the framing of timbers, preparing or assembling of materials at Vancouver, B.C., and, when requested so to do, to proceed from Vanvouver, B.C., on such steamer or other conveyance as the employer may designate, to such point or points in Yukon Territory, British Columbia, or Alaska, as may be required; transportation from Vancouver, B.C., to place of employment to be furnished by employer, first class to Skaguay, Alaska, and first class Skaguay to destination. One-half wages will be allowed for time actually consumed in the trip from Vancouver, B.C., to place of employment, or until actual work commences at destination.

"(2) Upon arrival at destination employee agrees to render such services as may be required in assembling, preparing, and assisting in transporting materials and machinery, and in actual construction work such as is contemplated by this contract.

"(3) The employee agrees to work continuously one shift each 24 hours, irrespective of Sundays or weather conditions, until the termination of this contract, or unless laid off as hereinafter provided. Ten hours to constitute a day, with day and night shifts, to either of which first

party may be assigned. All overtime to be paid for at same rate per hour as regular day's wages.

"(4) He further agrees to furnish such tools as are ordinarily provided for mechanics engaged in similar work (in labour contracts the above two lines to be stricken out). He will supply his own blankets.

"(5) He agrees that the employer may lay him off from time to time whenever the work is temporarily suspended wholly or in part owing to lack of or delay in the arrival of material or machinery, or on account of weather conditions, or any other cause, and the employer or its representative on the ground shall be the sole judge of the necessity or advisability of such suspension or partial suspension of work.

"In consideration of the foregoing covenants and agreements to be performed by the first party, the second party, the employer, agrees as follows:

"(1) It agrees to furnish board to first party free of charge at the company's boarding-house, and a bunk in the bunk-house, so long as the employee is actually employed at work or laid off during a temporary suspension of work, but if the employee is absent from work for any cause whatever he shall be charged at the rate of $1.50 per day for board and bunk, so long as he remains in the company's service or camp. This clause shall not in any way prejudice or impair the employer's right to dismiss for cause.

"(2) At least 24 days' work is hereby guaranteed employee in each full month.

"(3) Pay-day shall be on the 10th day of each month, and payment may be made by cheque drawn against the employer's account in local bank. The employee is to receive wages at the rate of $4.50 per day of 10 hours, same to be payable only when earned by actual labour performed for the employer.

"(4) The employer agrees to furnish return transportation at its expense from place of last employment to Vancouver, B.C., as bonus to employee in case he shall not have been discharged for cause and shall have devoted his entire time in working hours and faithfully performed the work required of him during the entire term of this contract, but it is expressly understood that in the event of the employee proving incompetent or not devoting his entire time and skill, or faithfully performing the work assigned

to him, the employer may terminate the employment, and this contract shall be at an end; and in all cases the employer shall be the sole judge as to the sufficiency of the grounds for such discharge and the termination of this contract. Unless terminated sooner, this contract shall be for a period of 5 months from the date hereof, unless the working season for outside construction work shall sooner cease, in which event the closing of the season shall terminate the contract.

"It is mutually understood that second party may assign his contract, and all covenants herein contained to be performed by the first party may be enforced against him by the assigns of the second party, as well as by the second party itself.

"In witness whereof the parties of the first and second parts have hereunto set their hands and seals the day and year first above written."

The plaintiffs by their declaration allege the agreement; their competency; that they came into the Yukon Territory under the agreement and went to work and performed such services as were required of them, arriving and going to work about 7th June, 1907, and that on 7th August they were, without any excuse and without notice, without default, omission, or wrongful act on their part, discharged; and that the defendants, without deciding on the sufficiency of the grounds for the discharge, recklessly and without pretext, excuse, or inquiry, discharged the plaintiffs and refused to furnish transportation from Dawson to Vancouver, as provided for in the agreement. The defendants reply that the execution of the agreement was obtained by the plaintiffs representing themselves as skilled mechanics and carpenters, and competent to assist in the construction of dredgers and mining plants and the installation of machinery, and that the plaintiffs were not competent to perform said works; that they did not work continually, as they were required to do, nor did they furnish the tools required to perform the work under the fourth clause of the agreement; that they proved incompetent, and did not devote their entire time and skill, and did not faithfully perform their work. In the alternative, they say further that the transportation to Vancouver claimed under the agreement is a bonus to the plaintiffs in case they should not be discharged for cause, and that the plaintiffs

were discharged for cause and not entitled to such transportation; further, that in and by the agreement it is expressly provided that in the event of the employees proving incompetent and not devoting their entire time and skill or faithfully performing the work assigned to them, the employer may terminate the employment and the contract shall be at an end, and that in all cases the employer should be the sole judge as to the sufficiency of the grounds for such discharge and termination of the contract; that the defendants under and by virtue of the said provisions did decide that there were sufficient grounds to discharge the plaintiffs, and terminated the contract; that thereupon they did discharge the plaintiffs and terminated the contract. To this the plaintiffs simply join issue.

The evidence given is somewhat contradictory, the plaintiffs and their witnesses alleging competency, and the defendants and their witnesses denying it. William Allman, one of the plaintiffs, says that he was competent to perform all the work which he was required to perform; that it was simple, easy work; that when he got to the place appointed for the work the work was not ready to be done; that there were too many men engaged; they were simply putting in time; that no complaint was made to him at all; if any complaints were made they were generally addressed to the gang, and finally when he was discharged it was without any fresh fault being alleged, but on his going to work in the morning he was told—"I think you had better quit with your brother." He had had no previous complaint made to him, and no notice. He gave evidence to shew that there was some animus in the mind of Clements, the foreman, against him, on account of some social differences; that on his discharge he didn't look for work, but went out prospecting.

Arthur Allman's evidence is much to the same effect, and his account of dismissal is as follows: That Clements came to him about a quarter before 6, when the work ceased, and discharged him, telling him to get his time; that he was then at work spiking, but at the very time Clements approached he was not actually working, but had just been working and was prepared to go on and work further; that he didn't work because at the time he could not owing to the crowd of men on the one place.

Harding DeWolfe, a carpenter of 20 years' experience, s he saw these men working and that they appeared to competent; that there were too many men employed; but draws a distinction, or seems to draw a distinction, be-en Arthur and William, by saying that Arthur was a t-class spiker. David Crawford's evidence was to the e effect; also that of William Hood, both carpenters of erience. They both say the work was simple, not re-ring much skill, and that these plaintiffs had as much l as any of the other men employed.

For the defence John Clements, the foreman and the who signed the engagement of hiring, said that the intiffs from the beginning shirked their work; that dur-the first week of their engagement there was no work be done at the ordinary carpenter work, but that they e required to be present to help to unload teams arriv-with the timbers from Dawson, and that when they e required they were sniping for gold or some place , but he says—"we had lots of men and I made no l;" he asserts that when they did work they only made retence of doing it, and, instead of helping to lift the bers, they simply put their hands on top of the sticks l did nothing. He admits that he had made no special nplaint to these men, addressing them particularly by e or drawing their attention to his complaint against m, except on an occasion after this, when he corrected lliam for putting in time on an old saw which was only rth 50 cents, when the time he occupied in filing it was rth $5 or $6; that neither of the men was competent to a jack-plane, and they were not willing; that William s not competent to use a tomaul; that Arthur was bet-at that. He says he reported their default to Mr. Carthy, who was the general superintendent of dredge lding.

John Walker, a carpenter of thirty years' experience, s the plaintiffs were very backward, were away when they e required; they were off sniping gold; and that when y were there they were not competent. He says he rd Clements chide William for idling. He said Arthur s pretty good with the maul; William could not hit a ke. Gardner, another witness and a carpenter of exper-ce, gave similar evidence; he says that the men could t use a plane.

Hardison, another carpenter of experience, said that the plaintiffs shirked their work; that William was worse than Arthur; that they were absent on one occasion when a load arrived that he knew of; that William could not bore a hole with an auger; that he spoiled an auger which he borrowed from Hardison. Grant heard Clements warning the men generally about holding back; he can't say he heard him warning the Allmans particularly; he knew of two occasions when the Allmans were not on hand, but were away when they were required to work; that William did not seem to be a carpenter at all, but he did not notice Arthur as to his competency.

McCarthy, who was general superintendent of dredge building for the defendant company, says that Clements reported that he had two incompetent men, but didn't name them in the first report; a week after he made another report naming these two men; he then took the matter up with Mr. Thomas, the general manager of the company in the Yukon Territory; that Mr. Thomas deferred action. Clements again reported as to the competency of these two men, and he again took the matter up with Mr. Thomas, and, after consultation, Thomas ordered the discharge of these men, which was communicated to Clements, and they were thereupon discharged. He says the plaintiffs got no warning or notice. They afterwards called upon him and complained of the injustice of their discharge. He said he would inquire into the matter and if he found any cause he would try to get them work on other parts of the operations of the company; that upon inquiry he found no reason to help them.

Mr. Thomas, the general manager of the company, swears to the reports given to him, that these men were causing trouble and demoralizing the work of the gang; that he consulted with the superintendent of dredge building, and that he ordered the discharge; both he and McCarthy swear that at the time of the actual discharge they were in need of men, were looking for other carpenters, and the men were not discharged because they had no work for them to do; on the contrary, they needed their services if they had been competent.

It is quite clear from the evidence that at the time the men first went to work there was an overplus of men; that they were really falling over each other; and that the fact

hat the men were away when the loads would arrive there rom Dawson was a very trifling matter, there being lots of nen around to do the necessary work; and really that the efendant company was as much to blame as the men for heir being idle during the first two or three weeks of the ngagement. Were it not for the special agreement, I hould hold that any such acts in the early part of the ngagement were fully condoned and overlooked, and if I ere to decide upon the evidence generally, I would find it ard to come to the conclusion that Arthur Allman was ncompetent and discharged for incompetency. I think, erhaps, that in the early stages of the employment he, long with other men, did loaf a little bit, but the loafing as caused more by the lack of work than by anything else. n his case, I think that pretty nearly every witness disnguished between him and William in his favour; even the itnesses for the plaintiffs make that distinction, which ould lead me to suppose that even in the minds of the laintiffs' witnesses there was some feeling that William erhaps was not up to the mark, as Arthur was. Clements, ne foreman, who was the main witness for the defence, hile I believe a very good foreman, was yet not a very ear witness in this, that he could not explain fully or early what the acts were that he complained of. It eemed to be more a course of conduct rather than indivinal acts either of insubordination or incompetence, and ne acts were probably cumulative in his mind, and he could ot very clearly distinguish one from the other. He is robably one of that class of men who make better foremen nan witnesses, and, while he knew perfectly well that the nen were not doing the work which they should do, yet he ould not clearly explain to the Court the facts on which he ased his complaint. I am satisfied that William was not p to the mark in his work, but I think that Arthur was as ompetent as could reasonably be expected for the class f work he was doing. Neither of the men appeared to have een apprenticed journeymen, but appeared to have picked p their work in a haphazard kind of way.

The main question in this case is how far under the greement it is competent for the defendants to discharge hese men under the clause, "It is expressly understood hat in the event of the employee proving incompetent or

not devoting his entire time and skill or faithfully performing the work assigned to him, the employer may terminate the employment, and this contract shall be at an end, and in all cases the employer shall be the sole judge as to the sufficiency of the grounds for such discharge and the termination of the contract."

The first case cited by the plaintiffs is McIntyre v. Hockin, 16 A. R. 498. This case is not directly in point upon the main question. It mainly goes to the question of the causes that are sufficient to justify dismissal. Maclennan, J.A., says: "Dismissal is an extreme measure and not to be resorted to for trifling causes, and if an employer retains a servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new. No doubt, the employer ought to have reasonable time to determine what to do, to consider whether he will dismiss or not or to look for another servant." This case is also authority for the law that if a good cause of dismissal really existed at the time of the dismissal, it is not necessary that the employer should know of it at the time, but it can be used as a justification afterwards for the dismissal.

There is also the case of Neelon v. City of Toronto, 25 S. C. R. 579. I cannot see that this case gives me any help upon the main issue.

It is hard to find a parallel case in the authorities. The cases which are most nearly like this one are to be found relating to building contracts, where the architect is the sole judge between the contractor and the owner.

The case of Dallman v. King, 4 Bing. N. C. 105, also found in the Revised Reports, vol. 144, p. 661, is also cited. The head-note of that case is as follows: "Agreement that lessee should spend $200 in repairs to be inspected and approved of by the lessor and to be done in a substantial manner, lessee to be allowed to retain the sum out of the first year's rent of the premises. Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent."

As an authority for the proposition that the plaintiffs should have been notified by the defendants and given a chance to be heard before the decision to discharge them was arrived at, the case of Capel v. Child is cited, 2 Cr. & J.

558, also found in the Revised Reports, vol. 37, p. 761; but I do not think that that case can be used as an authority in such a contract as the one I am considering.

The case of Roberts v. Bury Commissioners, L. R. 5 C. P. 309, is in point. That was a case of a contract to erect certain buildings according to plans and specifications. A clause in the contract provided for an extension of time owing to certain contingencies in the discretion of the architect; another clause provided for the architect's determining the contract if he concluded that, in his opinion, due diligence and due progress was not made in carrying on the work; it was held that the architect having been constitued the final judge of the matter, his certificate justified the defendants in putting an end to the contract. Considerable difference of opinion was expressed by various members of the Court in this case, one of the Judges saying that "the parties having agreed that the determination of the work shall settle the matter so as to bar inquiry into the actual fact, it would clearly be no answer to this plea to allege that there had in fact been no want of due diligence or the making of due progress." In this case the Judges emphasize the fact that the architect would be the best judge of the conditions; that it would be almost impossible for a Judge or jury to master the plans, drawings, and specifications so as to arrive at a satisfactory conclusion or even to investigate the matter; and the advisability of putting such powers into the hands of an umpire such as an architect was considered. Further in the judgment it was said: "We agree that if the parties have so contracted, the Court cannot inquire whether this is a prudent engagement on the part of a contractor; but we think that where the effect of giving such construction to the contract would apparently be to put one party completely at the mercy of the other, we ought not to give that construction to the contract unless the intention is pretty clearly expressed. It is not to be inferred that one party meant to bind himself so very stringently unless it was so stated. It is true that if both parties had confidence in the architect that might intrust him with the power to bind both parties." Kelly, C.B., in delivering the judgment of Channel, J., and himself, said: "We agree that we are not to assume a jurisdiction which we do not possess to mitigate the hardship upon contractors by clauses, however expressive, which are sometimes, and

indeed most commonly, introduced into agreements of this nature." These two Judge came to the conclusion in this case that the contract, in its proper interpretation, gave no such power to the architect as he assumed, and it was upon the construction of the contract that they went. And the case is not an authority for the proposition that such a condition is void as being a hardship.

The case of Wood v. Wood, 9 Ex., was also cited. I cannot see that this case gives me a great deal of help in the determination of the present case. The case was one of the expulsion of a member from a mutual insurance society, the contention being that the committee had power under the rules to expel without notice and without giving the party an opportunity of being heard. In that case it was held that the declaration shewed no cause of action, on the ground that the expulsion was no expulsion; that the act of expulsion, without giving the party an opportunity of being heard, was void; but this determination was based upon the rules and constitution of the society, not upon any express words such as are used in the contract I am considering. Kelly, C.B., in giving judgment, said: "This then is the great question in the case, was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gave the unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final, and could not be reviewed by any Court; but they are bound in the exercise of their functions by the rule expressed in the maxim 'Audi alteram partem,' that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having an opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate on matters involving evil consequences to individuals." That case is distinguished from the one I am trying, it seems to me, because the committee who expelled the member of the society under the rules were performing a judicial act of investigation; the Court so held; and I do not think it is at all analogous to the present case or to the cases where an architect is in-

trusted with the sole duty of determining and acting upon his own determination.

The case of Bisset v. Daniel, 10 Hare 303, reported in 90 Revised Reports, p. 454, is also cited. This, it seems to me, is a very important case and gives a great deal of help in the determination of this issue. As I conceive the matter, and from all the authorities which I have cited and will cite, the law is now that if it is clearly established from the document that the umpire, or whoever he may be who is intrusted with the powers of determining, has those absolute powers, that if the parties put themselves by agreement into the position of leaving their rights to be determined arbitrarily by any third person, they are bound by their contract; that the determination of the party binds them either in depriving them of their remedy, or being a condition precedent to their recovery; that the only limitation which the Court imposes upon the exercise of those powers by the umpire is that the powers shall be exercised fairly, not fraudulently, not capriciously, and with regard to honour," as it is put in some of the cases. For example, if in the case which I am considering, the company or its authorized representative has capriciously and without reason discharged these men for some object of its own, then I would hold that it had not the power to do so. The power, I think, is one which any large company would, in the exercise of due care, incorporate in its contracts of hiring, especially a company having the enormous interests which this defendant company has; it could not carry on its business unless it had some such powers, but those powers ought to be considered by the Court very closely, and it should be ascertained whether they exercise them fairly and honourably towards their employees. If they had discharged these men because they found that they had run out of work, and therefore wished to rid themselves of a burdensome contract, they could not do so; but if, after due deliberation and upon representations made to them, acting honestly, they exercised their powers, I do not think they could be questioned. I might even go so far as to say that the authorities go this far, that even if they mistakenly exercised their powers, yet if they exercised them conscientiously, the exercise of the power cannot be questioned. And for this I have the case of Bisset v. Daniel as an authority. In that case it was held that the powers were not exercised honestly

and with honour; that it was in the nature of a conspiracy or a plot on the part of the parties who exercised the power, before it was exercised. The case involved the expulsion of a partner, under an agreement in the partnership articles that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner. It was held that the power must be exercised with good faith and not against the truth and honour of the contract. The Vice-Chancellor, in giving his judgment in that case, said: "Now, with regard to these main points which arise in the consideration of the case; first, as I have said, the question is whether there is an absolute power of expulsion to be exercised by two-thirds of the partners giving notice, in the form stated in the deed, without any previous consultation or meeting in committee. I think it is impossible, looking at the clear words of the deed, to say, although the word "expel" is used, that it was necessary for the parties, especially looking at the form of the notice which was provided, to assign any ground for the expulsion or for their intention to put an end to the partnership as between themselves and their co-partners. I consider it is in their power to do it on their own sole authority. I hold that the defendants are correct in their contention that it was no answer that they should hold a previous meeting or that they should express or establish any definite cause for inducing them to give the notice in question." But, as I have said before, this case went off on the point that the parties did not exercise the powers with a due sense of honour and in good faith.

There is also the case of Morgan v. Birnie, 9 Bing. 672, 35 R. R. 663. In that case the defendant was to pay for a building upon receiving the architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges and sent them to the defendant. Held, that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant did not object to pay on the ground that no sufficient certificate had been rendered.

The case of Stanhard v. Lee, 32 L. J. Q. B. 75, is an important case. That was a case of a building contract, and the right of determining the contract if the work was not proceeded with with due diligence to the employer's satisfaction. It was held there that the intention to be

collected from the agreement was that "the defendant, if dissatisfied, whether with or without sufficient reason, with the progress of the work, should have the absolute and unqualified power to put on additional hands and get the work done and deduct the cost from the contract price payable to the plaintiff, and therefore that so long as the defendants were acting bona fide under an honest sense of dissatisfaction, although it might be ill-founded and unreasonable, they were entitled to insist on the condition, and consequently that the replication, which only alleges that their dissatisfaction was unreasonable and capricious, and did not allege mala fides, was no answer to the plea." It is to be observed that this case meets the pleadings in the one I am considering, where the allegation is that the defendants recklessly discharged the plaintiffs, but there is no allegation of bad faith.

Along the same lines is the case of Ormes v. Beadel, 2 Giff. 166, and the case of Bliss v. Smith, 34 Beav. 508. In the case of Ormes v. Beadel it was held that where upon a contract an award of an architect is final, and is fairly and impartially made, the Court will not relieve against it, however severe it may be in its effects, but where the arbitrator is found guilty of unfairness or partiality the Court will relieve against his award.

Also on the question of the hardship of such a contract, the case of Andrews v. Belfield, 2 C. B. N. S. 779. That was the purchase of a coach, where by the contract the Court held it was left to the acceptance of the purchaser in the following words: "That you undertake to execute it in a manner which shall meet my approval not only on the score of workmanship but also that of convenience and taste." It was held that "the purchaser might in his own discretion absolutely reject the article if it did not come up to his ideas of good taste, although he might not reject upon mere caprice; he must act bona fide and have an actual objection on that score to the article."

In Scott v. Corporation of Liverpool, 28 L. J. Ch. 230, the head-note says: "Where parties to an agreement provide for the settlement of disputes arising out of a contract by the arbitration of persons mentioned in the agreement, or to be determined when the disputes arise, this does not oust the ordinary tribunals of jurisdiction in such disputes, but where a contract provides for the determination of the con-

tractor's claims and liabilities by the judgment of a particular person, everything depends on his decision, and until his submission no right arises which can be enforced either at law or in equity." The Lord Chancellor said: "This contract has been characterized as one of great severity to the contractors, who are said to be placed by it entirely at the mercy of the arbitrary discretion of the engineer, but arguments drawn from the hard terms of an agreement are never admissible after it has been entered into, because the parties have deliberately consented to be bound by it." This seems, on the reading of the evidence in the whole case, to be one of extreme hardship, and yet it was held that the parties were bound by such a contract, the only qualification being that of bona fides and want of fraud.

There is also the case of Parker v. Ibbetson, 27 L. J. C. P. 236.

In the Am. & Eng. Encyc. of Law, vol. 20, p. 15, the law is laid down as follows: "Under a contract of hiring for a definite term, provided the services are satisfactory to the master, he has the absolute right, whenever he becomes in good faith dissatisfied with the services of the employee, to discharge him, and it has been held immaterial in such a case that in fact no valid grounds for discharge exist. Under a contract of this character, the dissatisfaction of the master must be genuine." It will be observed that the contract I am considering goes further than this where it provides that the master shall be the sole judge. Page 29: "In contracts for personal service, the incompetence of the employee to perform the services which he has undertaken is a sufficient ground for discharge, though he was hired for a definite period; "the word 'competency' imports nothing more than reasonable skill." The same work, vol. 24, p. 1336, lays down the following law: "The Courts have had frequent occasion to interpret contracts for the recognition of services, for the sale and manufacture of articles, etc., in which it was agreed that the services should be satisfactory to the employer, or that the article should satisfy the purchaser, and where there is an agreement that an act shall be done in a manner satisfactory to the promisee, it is generally held that he is the sole arbiter of the parties according to the agreement. It is not enough to say that the promisee ought to be satisfied, and that his discontent

is without reason, but it has been held that the decision of the person to be satisfied must be made in good faith."

There is also the case of Tibbs v. Wilkes, 23 Gr. 439.

Upon all these authorities I have come to the conclusion that this contract is not void on the ground of hardship, or that it gives the employer too arbitrary a power over the employee. The question to determine first is, does the contract in sufficiently clear terms express the intention of the parties? I think it does. I think there can be no doubt that it was the intention of the parties to give such power to the employers. Next, I must be satisfied that the employers did not exercise these powers capriciously and in bad faith. I cannot come to that conclusion. It is clear from the evidence that 3 distinct reports were made complaining of these men; that the matter was considered by the proper authorities, first by the foreman in charge of the work, who was clearly dissatisfied with the men. I think the plaintiffs have failed to prove any animus in his mind against them which would lead him to dismiss them without cause, but that his conduct is borne out by the majority of the men who worked upon the ground, as to the incompetency of the plaintiffs, as I have already stated. Then the matter was considered by the superintendent of dredge construction generally, and further taken up and deliberated upon by the general manager over the whole operations in the Yukon, and a conclusion come to, I think in good faith, that these men were not doing their duty. It may seem a hardship that these men should be brought all the way from Vancouver and then dismissed in this country, but that is entirely their own fault. They agreed to the terms in the first place, and certainly gave some cause, at all events, for complaint against them. I cannot relieve because the contract is harsh, even if I came to that conclusion, but I cannot come to that conclusion. One must consider the nature of the employment, the extent of the operations, and the necessary powers which such a company ought to have to effectually and with fairness to itself carry on its operations.

It is contended that the act of the company in dismissing should have been determined after notice. I do not think that any authority can be found for that proposition of law.

I certainly can find none in the cases cited to me; in fact, they are to the contrary, if I take the cases of building contracts and the powers of architects as analogous to this. It would be unreasonable that a trial should be held every time that the company saw fit to discharge a workman, and certainly the contract does not imply any such term. Then again it is contended that the actual dismissal should be a corporate act; that it should have been done by the board of directors in fact. This company is a foreign corporation, registered in the Yukon, and is carrying on extensive mining operations, employing hundreds of thousands of men. At the time when these men were working it was shewn that other works were going on in various parts of the Territory, other dredges being built, and other operations in the nature of dredging and so on being carried on. In the first place it seems to me to be most unreasonable that every hiring of a workman and every dismissal of a workman should be an act done by the corporation in its corporate capacity at a meeting of the board of directors held for that purpose. Surely that cannot be seriously contended. If a discharge must be a corporate act, then the hiring should also be a corporate act. The contract which these men sue under is one made by John Clements, the foreman (whose evidence I have already mentioned), acting for the company, and is not a corporate act. It is contended that because of the use of the words—"the employer shall be the sole judge," etc., therefore the act of dismissal of the employer (being the company) should be a corporate act. But I hold that such acts as these—the hiring and dismissal of workmen—are not such acts as require the corporation to act as a body corporate by resolution and under its seal. In this connection I would cite Lindley on Companies, pp. 159 and 223.

Holding as I do, it will hardly be necessary for me to consider another question raised, namely, that the plaintiffs have no right to recover for the gratuity they sue for—return passage to Vancouver—which is mentioned in the agreement as a bonus, the clause being—"The employer agrees to furnish return transportation at its expense from place of last employment to Vancouver, B.C., as a bonus to employee in case he should not have been discharged for cause, and shall have devoted his entire time in working hours," etc. It will be observed that the bonus was to be paid only if the employee

hould not have been discharged for cause. I have already eld that he was discharged for cause, because the determina-ion of the employer properly made by the managing director as a determination that the men should be discharged for ause, and that determination being made, I have concluded hat I should not review it, but be bound by it, being made in ood faith. This would prevent the recovery of the bonus. But it is further argued that no bonus can be recovered be-ause a bonus is a gratuity, and gratuituities are not re-overable. The word "bonus" is defined by Wharton as "a remium or advantage," "an occasional extra dividend," "a ratuity." Macdonell on Master and Servant, p. 149, says: No action will lie to recover gifts or gratuities. It is not lways easy, however, to ascertain what are gifts or gratuities. hat a particular sum is spoken of as a gratuity does not ecessarily decide that it is not of the nature of wages." I ay refer to the case of French v. Brooks, 8 Bing. 354, and lderson v. Mattison, 7 Q. B. D. 174, on this same point.

If I did not hold that the plaintiffs were properly dis-issed by the company, I could not in this case have held at the bonus here mentioned was a bare gratuity and covered y these authorities as something not recoverable. I think e bonus here provided for is in the nature of wages and as much part of the contract as the wages payable onthly. It is part of the consideration given to the laintiffs for engaging to do the work and to come into the untry, and is not a gratuity, in the ordinary sense of a ratuity, but is clearly wages payable under the contract if ey had fulfilled their part of the contract. I am compelled, I have already said, to hold that the contract gives the nployer power which it is contended it does; that he ex-rcised that power bona fide and in an honourable manner; at the plaintiffs are bound by the exercise of that power; d that there is no fraud or bad faith either alleged in the leadings or proved by the evidence. It may seem to be a rdship, but if parties will contract in that manner they have ly themselves to blame for it, and I must determine, in the ght in which I view the evidence, that they have no cause action.

The action will therefore be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. DECEMBER 19TH, 1907.

TRIAL.

REX v. SALA.

Criminal Law—Keeping Common Gaming House—"Gain"—Payment for Refreshments—"Rake-off"—Profit—Gambling—Keeper of House—Players at Game—Onlookers.

The defendant was charged with keeping a common gaming house.

This case was tried before CRAIG, J., sitting as a police magistrate, under the powers in that respect conferred by the Yukon Act.

H. S. Tobin, for the Crown.

F. T. Congdon, K.C., for the accused.

CRAIG, J.:—The evidence discloses that the accused is the holder of a saloon license; that in the rear of the saloon is another room, to which the public has free access at all times, either for lounging or any other purpose to which frequenters might resort. On the evening in question several parties were playing a game of draw-poker, one man having charge of the chips and being accountable to the house for the chips. In every jack-pot at least, and one witness says at every deal, a rake-off was taken of one chip or 25 cents, which was put aside and used to pay for refreshments, drinks, cigars, etc. Drinks were called for by the players and brought in by the bar-keeper of the house; he was not paid at the time, but at the end of the evening's play. The man having charge of the chips and who took the rake-off, would pay for all the drinks together. There appears to have been no account kept of the amount of the rake-off or of the amount of the drinks, and whether the whole of the rake-off went to the bar, or whether any balance over the amount required to pay for the drinks went to the dealer, could not be ascertained. This game was carried on several evenings in the month preceding the date of the alleged offence and covered by the charge, the same person always acting as dealer. If at any time he was absent, another man—always the same man—sat at the table and took his place. The same system was adopted on every

occasion. It appears that as much as $70 was paid over to the bar by this process of rake-off and payment in chips on one occasion, and that the amounts ran from $5 to $20 and $70 according to the length of the game.

Here we have a clear scheme arranged and settled between the house and the dealer at the table and the players at the table, by which a rake-off was taken and the game maintained for the benefit of the house.

In 1903 I tried with a jury a case similar to this one, and in my charge to the jury I directed them that in a case similar to this the accused would come under the Act, and that such gambling was gambling for gain for the house, and the accused was liable; that it applied generally to any business which was carried on in that way; that if a cigar seller, hotel man, or any other person encouraged gambling and kept gambling utensils for the purpose of advancing the sale of the articles which had been in his store or place of business, he came under the Act. The intent was the real matter to be considered. At the time I gave that direction the case of Rex v. James, 6 O. L. R. 35, 2 O. W. R. 342, was pending before the Court of Appeal for Ontario for judgment, and I find that these same views were expressed by that Court. Osler, J.A., delivering the judgment of the Court in that case, and defining the word "gain," said: "It is that which is acquired or comes as a benefit, profit, or advantage, and it may be derived indirectly as well as directly." He found that the gambling was an adjunct to the usual cigar business of the dealer, and "by what he allowed to be done there the profits of that business were increased more or less by the sale of the goods in which he dealt, and so he might be found to have kept it for gain, though the gain was confined to the profits on the cigars which he sold to the players."

I directed the jury in the case of Rex v. McArthur that it did not matter whether the keeper of the house got a direct gain from the game or not, that is, whether he was paid directly from the players by rake-off or by the retention of chips or by having any advantage in the game itself; if the carrying on of the game promoted the sale of his goods, to his knowledge, and was done for that purpose, he was equally liable; that is, that, although the result of the gambling might be simply the ordinary profit which he derived from the sale of his goods, yet if he carried on the game with that object, he was liable; and no artifice or trick to cover the real nature

of the game will save the offender from the operation of the Act.

It appears that a wrong impression has got abroad, given by directions as to what is an offence under the Act. There is nothing in our Liquor License Ordinance to prevent gambling in hotels or saloons, and it has been thought by some that such a game as we had evidence of in this case was not illegal; that the playing of cards for drinks is not illegal. It is not my business to direct as to how far men may go and be within the law. Gambling of itself is not illegal. It is the keeping of a gambling house for gain which is the charge and which constitutes the illegality.

In the present case, owing to the fact that the impression that this game was not illegal was created by some authority, I am disposed to be lenient, and will allow the onlookers to go dismissed. There was no reason for them to suspect that the game was an illegal one, because it might have been perfectly legal, so far as all appearances went, and as far as they could judge without knowing of the conditions which were disclosed in evidence. The room was not a closed room; a person entering there might enter it quite innocently as a room adjoining the bar. Therefore, they are allowed to go. As to the players, they will be found guilty and sentence suspended for 6 months. The keeper of the house, that is, the saloon keeper, will be fined $20 and costs. I intend this judgment to be as much a warning as anything else, so that there may be no mistake in future as to how this Court will rule upon any such case coming before it.

YUKON TERRITORY.

CRAIG, J. DECEMBER 19TH, 1097.

TRIAL.

DAVISON v. SCHWARTZ.

Husband and Wife—Business Carried on by Husband in his own Name Alleged to be Property of Wife—Seizure of Plant and Stock of Business under Execution against Husband—Claim by Wife—Interpleader Issue—Evidence—Married Woman's Separate Estate—Statutes.

An interpleader issue.

F. T. Congdon, K.C., and Frank J. Stacpoole, for plaintiff.

R. L. Ashbaugh and George Black, for defendant.

CRAIG, J.:—This is an interpleader issue directed to try he question of the property in the articles set out in the issue, onsisting of horses, waggons, engine and boiler, saws, trucks, leighs, waggon boxes, some other machinery, and 2,367 cords f wood seized by the sheriff under execution at the suit of he defendant in this issue, and on a judgment obtained gainst J. H. Davison, the husband of the plaintiff. The ssue is a simple assertion and denial of property in Margaret . Davison. There are no pleadings beyond that. The case nade out for the plaintiff, put shortly, is that these articles re hers, acquired mainly through a bill of sale given in September, 1905, and because the articles were acquired in er business, and the wood was cut on her property. She sserts that this was a business carried on separately from er husband.

To understand the position of the parties it will be necesary to go at some length into the history of the whole transction. The plaintiff and her husband are living together henever the plaintiff is in this Territory, which is seldom. They came into the country some time before 1898, and the rigin of any property or money which she has or claims to ave arose then. She staked property on what is known as Magnet Gulch, being directed to the spot by two friends of ers and her husband's—Mackenzie and Miles. After she had eld that property for some time, an action was brought by Mackenzie and Miles, claiming an interest in the property, or a division. Mr. Justice Dugas, who tried that case in 900, in a very strong judgment declared the contention of he plaintiffs to be supported, and directed a sale of the proerty, declaring that Mackenzie and Miles were entitled to a alf and that Mrs. Davison, the plaintiff, and her husband, ere entitled to the other half, that is, each of the Davisons o have a quarter. The business at that time, as appears by he evidence of Mrs. Davison, was carried on by her husband, . H. Davison. He negotiated the sale of the property after he judgment, and himself received all the purchase money—20,000. Of that he says he deposited $10,000 in the name f his wife in the Bank of British North America, and there produced, not an original bank book, but a copy of the bank ook, shewing that that was done. That money was paid nto the bank in September, 1900, and chequed out at various mes between that time and November, 1902. Davison said hat out of his own money—the $10,000 coming to himself—

he paid $3,000 for lawyers' costs, and the balance he invested in real estate in his own name.

None of the documents in use at that time have been produced. He says that he has parted with all that real estate at a loss; the other moneys he used to go into business, that is, the moneys of his wife. He says that was done with her authorization. But the business which was entered into was a wood business, The exact date of the contract made with the owners of that business does not appear, the document evidencing the bargain being lost; but we have this admitted by Davison in his evidence, that his wife's name was not mentioned in the transaction. The bargain was made in his own name. It is not in evidence that his wife was in the country at the time, and there is no evidence at all that she was aware that he was going into the wood business. He might just as well have gone into any other business as the wood business, and used her money in that way. He used his own judgment absolutely as to what he should do, and at that time, so far as Mrs. Davison, the plaintiff, entering into business is concerned, it amounts to no more than this, that she gave her husband her purse to do as he liked with it. He had an absolute power ot attorney to draw on this bank account, and he did it as he saw fit up to that time, mentioned before (1902). She was never consulted when any particular cheque was drawn. He says that wood business cost him $8,000, but the cheques which he says were issued on that account and on that business are not produced. So that we do not know in what amounts they were issued, nor can we tell their application. All we have is Mr. Davison's word that that money was used in that business; but it is not at all clear as to the exact amounts or as to the application of the cheques. After 1902 the account in the bank ceases, and Davison deposits all the money in his own name. All contracts are made in his own name. There is a contract or a statement evidencing a contract made between Davison himself in his own name, without mentioning his wife at all, and the Sinclairs, from whom he acquired the wood business, shewing the contract, its terms, the statement of the wood cut under it, and the profits and the division of the profits, all in Davison's and the Sinclairs' names, all receipts taken to J. H. Davison and not to Mrs. Davison, although Davison swears that during the whole of this period the business was his wife's and not his. Then again he makes a contract with this very defend-

ant, who now acquires this judgment, in his own name, in 1904; and again in 1905 he makes a contract with the same party. In 1902 there is a contract between Davison himself and the N. A. T. and T. Company for the purchase of certain timber berths, and up to 16th September, 1905, Davison carries on the business exactly as if it were his own. His wife never interferes; he renders her no account; he deposits no money in her name. Assuredly up to this date it was Davison's business, and the relations between himself and his wife were simply that he borrowed so much money from her. The public never knew of her connection with the business; they never had any means of knowing. The business was called the name of "The Klondike Wood Yard." As I have already said, he acquired this wood business in 1901.

Mrs. Davison was examined for discovery in this action and also cross-examined upon her affidavit, and from that examination it appears that she first arrived in Dawson in July, 1898; that she went out to the outside—as we say here—in July, 1899, returning in September of the same year; that she left again for the outside in September, 1900, and returned in September, 1901, again going out in July, 1902, returning in July, 1905, leaving in September of the same year, and not returning until June of the present year—1907; going out again in September of this year and before the trial of this action, as her husband swears, on account of her health.

Speaking of the purchase of the wood business in 1901, Davison will not say that Mrs. Davison was in the Yukon at that time, but he says that she was around about the time of the purchase; he does not say that she was not in the country when the negotiations started. The wood business down to 1905 produced large profits. There is no evidence of any accounting by Davison to his wife for any part of these profits. They went into his own pocket or into his own bank account. The profits in 1900 were about $4.000, of which Davison got half or thereabouts. At that time Davison says he kept no books, and certainly no cash book. He kept no record of where the profits went. He says—"I presume they went on deposit to my own name in the bank." He has lost, he says, those bank books and the cheques during all that period between 1901 and 1905. In 1901 and 1902 he was a

partner with the Sinclairs; after that he bought them out entirely. Besides making a profit on the deal of 1901-02 he got back the entire capital expenditure of course, and that seems to have been mixed with the profits and carried into his own account afterwards. He made no accounting to his wife then. Being asked how he paid this back, he said "In various ways." He purchased property for her and timber berths, but the property, he says, was purchased in his own name, and that is evidenced by some documents produced of these purchases which were made to carry on this wood business. He bought horses, boilers and engines, and so on. Davison continued to make large profits between 1901 and 1905, and all the profits went to his credit in his own name in the bank. He says he kept no books until 1906, or has none to produce. In the contracts with Schwartz, which are contracts to cut and deliver wood, Davison represents himself in his own name as being the owner of the timber berths. Davison produces books of the wood business, but no books, as I have said before, of his account with his wife. The wood business account is kept very accurately, shewing the expenditure and the receipts and the profits at the end of each term. The profits for 1901-02 I have already given. For 1902-03 they amounted to $6,078.51. The books appear with the balances neatly closed up in Davison's own name. The business started in 1904 is marked with "Schwartz in account with J. H. Davison." Then follow the expenditure, the advances made to Schwartz, and in 1905 the balance is struck shewing the number of cords taken out by Schwartz for Davison, the net profit being $2,620.30. The profits of the 1905 contract were $3,145. The book account starts in March, 1905, headed, "Schwartz in account with Davison, season of 1905 and 1906," and runs on until October, when we find the name of "J. H. Davison" changed in red ink to "M. L. Davison," and then continued on in that name until December, 1906, when the account is closed with Schwartz, and the number of cords set out. The profits for this year were over $10,000, as appears by another book—exhibit S, p. 143—where the sales of this season's operations are carried in, shewing a very extensive business. All this business is carried on by Davison himself, without any intervention on the part of his wife. The public are not aware of her connection with it, and in the period after September, 1905, he calls his business "The Klondike Fuel Company." A card is produced of the

siness before 1905, where the business is call the "The ondike Wood Yard, J. H. Davison, manager." In Sep- nber, 1905, Davison gives a bill of sale to his wife of the ods and chattels and furniture in the house, the portable iler and engine mentioned in the particulars in the issue, th appliances and tools and other effects pertaining thereto; also transfers to her all the fire wood situated on the banks a slough on the Klondike river, about 600 cords, describing as being cut on timber berth No. 119; also some bob- eighs. This bill of sale, as appears by the evidence, was gned by Mrs. Davison just as she was leaving on the steamer 1905 to go outside.

Davison during all this time held a general power of at- rney given in July, 1899, as full a power of attorney as he uld possibly, have given almost, being the general printed rm. On the same day on which the bill of sale was taken, avison assigns to his wife the contract which he made with chwartz in April, 1905, to cut timber for Davison. In that signment it is recited that Mrs. Davison assumes the obliga- on of the assignor Davison, the consideration expressed ing $1. This assignment is made by Davison to his wife, d is not signed by her, but is signed by himself under his neral power of attorney. I doubt very much whether Mrs. avison was ever aware of any such assignment. At the foot the assignment there is an assent to it by Schwartz, and on this assent the plaintiff apparently hinges her case. chwartz says that Davison told him that his wife had ad- nced money to him, and that for that reason he wished to sign the contract to her. Davison says that he explained Schwartz that the whole business was his wife's and carried for her, and that this assent was to give effect to what had ways been the understanding between the parties. Schwartz ys that Davison told him just to sign this, that it would ake no difference to him, and he did so. A witness Forrest as present when the document was signed. He says that avison read it over, and that Davison told Schwartz that the oney for the business came from his wife and that it would ake no difference to him (Schwartz.) After this assign- ent—and it will be observed that it is simply an assignment the contract—Davison continues the business just in the me old way; there is no apparent change. The bill of sale not recorded for some months and is recorded under the

special provisions of our Ordinance as late as February, 1906, an order having to be obtained from the Judge for that purpose. The business is not assigned as a business of Mrs. Davison, and the bank account is not changed until February, 1906. There is no accounting between Davison and his wife at this time. The profits and the principal are all still mixed up. Davison says that he was working without salary, and does not know what he is going to get, but expects to be allowed what is reasonable. But he has the money in his own pocket and does just as he likes with it. We have here profits amounting to nearly $20,000 made in this business, and not a scrap of paper between the owner of the business, according to her own and his evidence, and the man running it. Under the assigned contract the wood was taken out and Schwartz paid in full.

The next year Davison hires Schwartz as his foreman to go on to certain timber berths and get out wood at the rate of $6 a day as wages, and that is the contract which Schwartz sues upon and on which he obtained judgment and which is the cause of this interpleader issue. It will be observed that the contract which was assigned was a contract for one year, and that the hiring of the next year was a totally distinct thing, and the money earned under it had no relation whatever to the previous contract. During the continuance of this hiring Schwartz gave several orders upon Davison, directed to Davison in his own name, which Davison paid and honoured. Several accounts were made out in Davison's name, due bills for men's hire, which Davison paid and honoured; merchants' accounts were made out in Davison's own name headed "J. H. Davison." But Davison says in paying these accounts after 1905 he changed the initials "J. H." to "M. L.," and they were so changed before they were paid to the different merchants. The accounts are produced in Court, and all have that change made in them now. This is evidence that the general merchant public treated the business as late as August, 1907, as Davison's. Receipts are produced for purchases in the name of M. L. Davison, one in 1906 for the purchase of horses from one Kirk, and another from the North-West Mounted Police of 2nd May, 1907, and a third in October, 1906, from Wilson & Currie for the purchase of waggons, being some of the articles in question. But we have in May, 1907, a receipt in

J. H. Davison's own name for the sale of a Bain waggon, which is as much his wife's property as any other of the articles in question. There is no mention made of Mrs. Davison in this receipt.

Further, we have an important piece of evidence, not contradicted, of a bill of wood delivered to George Black, 19th December, 1905, two months after the transfer and bill of sale, headed "J. H. Davison, wood dealer," marked "paid, J. H. Davison," clearly shewing that after the bill of sale there was no change at all in the business, that it was carried on by J. H. Davison without his wife interfering or knowing what was going on. The plaintiff relies further on the fact that the wood in question was cut on Dominion land permits issued in her name, there being two permits, one for 1,000 cords of wood, dated September, 1906, and another for 1,600 cords of wood, dated April, 1907. There are also produced—although they bear very little relation to the issue— several permits or licenses to cut timber on Dominion lands, issued to the plaintiff for 1906-07 and 1907-08. We have no evidence that any one in the world beyond Davison and his wife knew that she had any interest in the business at all, except the fact that Schwartz assented to the transfer of the contract of 1905, and that these permits to cut timber after 1905 were issued by the government in Mrs. Davison's name. If that can be called a business carried on by a wife separate from her husband, it is a remarkable thing to me. We have this further startling fact that the debt sued for was contracted by Davison—he says as the agent for his wife—to take out the very wood which was seized in execution and which Mrs. Davison now claims as hers. Schwartz had no reason to believe that Mrs. Davison was his debtor. Davison never told him so unless it can be said that the transfer of the contract of 1905 was notice to Schwartz; but he goes on just in the same old way honouring Schwartz's orders on him for men's wages and advances, in Davison's own name, not in his wife's; and when Schwartz sues for his wages then for the first time Mrs. Davison's name mentioned, and her name is not mentioned until after Schwartz has recovered his judgment after trial against Davison. And the progress of this suit is worthy of consideration. Schwartz sues; Davison defends, setting up various defences and a counterclaim. Davison is examined for discovery. When he appears he says: "I am

not producing my books because I am abandoning all my counterclaim against Schwartz;" and practically admitting his debt. He never suggests during a long cross-examination that he is not the real debtor; his wife's name is not mentioned. He is no lawyer, but he very astutely fences with the cross-examining counsel and keeps off anything which would discover to the plaintiff in that action who Davison contended was the real debtor, but leaves him absolutely in the dark. So that this discovery of Davison under oath at that time is a farce, and he deliberately conceals and does not discover what is his true defence. Neither in his pleading nor in his examination is any indication given of the evidence which he afterwards gives on the interpleader issue, but he allows Schwartz to go on and take a judgment after trial without disclosing his defence.

More than this, Mrs. Davison is examined for discovery upon this issue and cross-examined upon her affidavit, and in her evidence she asserts that the business is hers, carried on with her money, that she knew it was going on; but being pressed on various points always said—"I relied entirely on my husband; I exacted no statements from him, and I presume he owes me something yet; how much I don't know." Her evidence somewhat contradicts his, in that she says he bought some property for her, and Davison says he used his own money to buy the real estate which has since been sold. She admits in her evidence, somewhat in opposition to his, that a quarter of the Magnet Gulch mining property belonged to Davison—her husband; but when being pressed to answer as to her knowledge of the law suit brought by Schwartz against her husband (being the suit in which judgment was obtained and seized upon) she refuses to answer whether she was aware of what Davison was doing in the defence or not. She says she was aware that Schwartz had brought an action against Davison to recover his wages, but that she became aware of that in June last. Being asked if Schwartz did the work for her last winter in cutting this wood, and whether under her instructions and under a power of attorney Davison defended the action, she refuses to answer. The question being pressed as to whether Davison was defending for her in that suit to recover for the work done or not, she refuses to answer on the advice of her counsel. What the counsel should have done at that time was to have brought

Mrs. Davison before some Judge to compel an answer. The question was a most proper one, and should have been answered promptly, particularly in a case of this nature. But the refusal to answer is perhaps just as useful for the purposes of counsel as any answer which could have been given.

The position of the affair then is this: Schwartz has for years been working for Davison with one interruption, when a contract made with Davison was assigned to his wife. He is a simple wood cutter, probably with no knowledge of legal technicalities or business, and trusted to Davison absolutely, as appears by his evidence, dealing with him and sending orders and accounts to him in his own name. He cuts this wood and delivers it, asks for his money, and is met with the defence which is abandoned at the trial, takes his judgment against Davison without any hint of any other debtor, and when he comes to seize upon the very wood which he himself produced, and which he could have a lien upon if he had wanted to, he is then for the first time met with the claim of Mrs. Davison, who says she is the owner, and, although she claims to be the owner, and has got the benefit of Schwartz's work which produced the property, she refuses to pay, saying —"You have sued on a contract with my husband; your judgment is against him; you cannot now recover against me, and I refuse to pay."

The defence at law is that she was a feme sole and was carrying on this business separate from her husband. If she is a feme sole and has all the rights and obligations of one, then I take it that a person in that position, and claiming the legal rights which such a position would give her, should at all times act in fact exactly as if she was a feme sole. Because she is the wife of this man Davison does not relieve her from acting towards the public as a feme sole or another man's wife would act. If she gives her purse to her husband and allows him to go on with a business as if it were his own, then she is not acting as a feme sole. The old common law provisions regarding a wife's earnings and property and the husband's rights over the same are gone under the statute, but only under the statute, because the statute affords a protection to the wife's property when the wife brings herself within the statute. There may be cases, and there are, and I will cite them hereafter, where a wife may live with a husband and carry on business separate, but it must be clear and

distinct, and the world must know. None of the goods in question were acquired by the plaintiff in the first instance in her own name; they were all acquired by her husband, and never at any time has her name appeared except in the assignment and in the bill of sale, and purchases made after that. Never at any time has the husband accounted to her, nor have the profits been distinguished from the capital.

It was argued by counsel for the plaintiff that under our Act, ch. 43 of the Yukon Ordinances, it would not matter at all what the act or conduct of a married woman might be; that a business carried on in the manner in which this business was carried on would be hers and all the profits arising from it. The Act is a very short one and is as follows: "A married woman shall in respect of personal property be under no disability whatsoever heretofore existing by reason of her coverture of otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a feme sole." Besides this, we have the North-West Territories Act, and sec. 36 in relation to a married woman is as follows: "All the wages and personal earnings of a married woman and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband or derives from any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman and disposed of without her husband's consent as fully as if she were a feme sole, and no order for protection shall be necessary in respect to any such earnings or acquisitions, and the possession, whether actual or constructive, of the husband, of any personal property of any married woman shall not render the same liable for his debts." I do not think that these Acts are inconsistent one with the other, but that they can be read together; and in this case I think that the plaintiff, if she succeeds, must succeed because she has been carrying on a separate business from her husband. It seems to me that the law in this Territory in effect is the same as the law in Ontario to-day and the law in Manitoba, and the authorities there are authorities for the interpretation of our statutes. I can conceive of no case stronger than the present one, where a business claimed by a wife is not one within the statutes as being a separate business carried on by her.

There is the case of Dominion Savings and Investment Society v. Kilroy, 15 A. R. 487, where it was held as follows: "Even though the business might not be the business of the wife carried on by her separately from her husband, within the meaning of sec. 7, so as to protect the earnings from her husband's creditors, the goods so sold to the wife were her own property under sec. 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors. Quaere, whether this would be so with regard to goods purchased and to be paid for out of earnings of such a business." In that case the business was carried on in a married woman's name, but managed by her husband. It will be observed that there is a very great distinction between that case and this one, where the business was carried on by the husband in his own name. And Burton, J.A., in giving his judgment, said: "It would appear in this case that neither the execution creditors, who are the claimants, nor any of the creditors, had been deceived, and it is a question solely of property, the evidence being all one way." He further says: "The earnings from the business and the right to them when the business is conducted by the husband, either altogether or to such an extent as to make it impossible to say that the wife carried it on separately from her husband, are different matters and need not now be discussed."

There is also the case of Murray v. McCallum, 8 A. R. 277, where there was some difference of opinion between the Judges. There it was held by Sprague, C.J., and Cameron, J., that the facts shewed the plaintiff to have a separate trade or occupation within the Act, the husband not having the control of the business, but being hired for a particular duty. Burton, J.A., says: "It was not contended that there should be an inquiry under the Act as to the bona fides of such transactions, but that the fact of the husband's interference, with the concurrence of the wife, deprives it at once of its separate character." Burton and Patterson, JJ.A., both concurred in this, that the interference of the husband with the business, as shewn by the evidence, was such in reality as to prevent its being treated as a separate business of the plaintiff. In this case the Court divided, it being apparently the opinion of Cameron, J., that the Act offorded a greater protection to the wife than in the opinion of Burton and Patterson, JJ.A., it did. The last two Judges laid greater stress upon

the evidence of the facts regarding the carrying on of the business than did the other Judges.

To my mind, the question before me is whether, in fact, and ostensibly to the world, there was a separate business carried on, or whether there was such an interference on the part of the husband as to create the inference that the business was really his and not hers, or that it was their joint business. Much stress was laid in this case of Murray v. McCallum on the fact that the husband was actually hired and appeared as a barkeeper, not as a matter of form but as a matter of fact, just as if the wife had been sole and he a stranger. Cameron, J., in his judgment, said: "In my judgment the only kind of occupation or trade bona fide carried on by a married woman that would disentitle her to the protection afforded by sec. 7, ch. 125, R. S. O., is an occupation or trade in which her husband has some legal or equitable interest or right of interference as between her and him. The authorities shew that it is not essential that the husband should live apart from his wife to make her occupation or trade a separate occupation or trade, or, in other words, one carried on separately from her husband. If a husband live in a house with the wife where she carries on business, she does not in one sense carry on an occupation or trade separate from him, but if he has no interest in the occupation or trade, it is separate from him in a legal sense."

There is also the case of Campbell v. Cole, 7 O. R. 27, a case not nearly so strong as the one I am considering, and in which the Court held that the business was not one carried on separately. There the wife claimed to carry on a business separate from the husband. It appeared that since their marriage a store business had been carried on in the name of the wife, and frequent transactions in real estate had also taken place in her name, but that in most of them the husband was the bargainor, and it was only when the bargains had to be carried out that the wife appeared in them; that the husband kept the store books; she knew little about that; the husband made all the purchases of stock nearly; sold the goods; spoke and acted as if he was the owner; he received no wages, but took what money he wanted and when he pleased; used his own judgment in the transactions. The Court, setting aside the verdict of the jury, declared that this was not a separate business, but that the goods were liable to seizure for the husband's debts. Boyd, C., distinguished this

case from Murray v. McCallum in this, that the husband was not in receipt of wages. In spite of the fact that the business was ostensibly carried on in the wife's name, the Court held that the business was really the business of the husband.

I would also cite the cases of Ripstein v. British Canadian Loan and Investment Co., 7 Man. L. R. 119, and Merchants Bank v. Carley, 8 Man. L. R. 258.

The conclusion which I come to in this case is that the business was really not the business of the wife, up to 1905; that is absolutely clear. After that it was contended it was, and in any event Schwartz at least knew of it being so. I think all that Schwartz knew was that the contract of 1905 was assigned. The wood cut and sued for was not cut on the same ground as the wood cut under the former contract which was assigned. I do not think this is any more the business of the wife than of any other person whose name Davison might see fit to use; if there is any liability at all it is between Davison and his wife. He may be called upon to account to her for the money which she lent him, and I think the bill of sale is no more than a security given to her for these advances. This bill of sale does not cover this wood. It was not seriously contended by counsel for the plaintiff that up to the time of the bill of sale the plaintiff could have succeeded in the contention she now sets up. What difference has the bill of sale made? The bill of sale does not transfer the business, and there is no other evidence of transfer of business. If the business was Davison's up to that time, and the profits were his, what has been done since to make those profits hers or to make the business hers? The profits and capital are mixed up. There is no evidence of what has become of those profits. The money in the business earned by him, in his own business up to that time admittedly, is still his and is still invested in the business. He has made no distinction whatever in the moneys, and the only thing which he is liable to is to account to his wife for the capital which she advanced to him. He might just as well have put any other label on the business as "M. L. Davison."

The judgment will be that the articles covered by the bill of sale, except those (if any) which are specially exempted by the letter written to the sheriff and which the plaintiff abandons, are the property of Mrs. Davison, and

as to the fire-wood and other articles seized, I hold that they are the property of Davison liable to seizure for his debts and made in his business. When one thinks of the unconscionable character of the claim set up against this workman, it would be a travesty on justice if a man could be defeated by any such artifice, and considering the nature of the relationship between Mrs. Davison, the plaintiff, and her husband in this business, and the conduct of the action which was brought by Schwartz against Davison, and the concealment made by him during the whole of that litigation, there can be no question as to how the costs should go. The costs of this issue will be paid by the plaintiff.

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MANITOBA.

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COURT OF APPEAL.

THEO NOEL CO. v. VITÆ ORE CO.

Pleading—Statement of Claim — Prolixity — Irrelevancy—Embarrassment—Rules 306, 326—Trade Name—User—Invasion—Injunction—Damages.

Appeal by plaintiffs from an order of MACDONALD, J., in Chambers, dismissing an appeal from an order of the Referee in Chambers striking out paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 13, and 16, of the statement of claim as embarrassing.

The statement of claim was as follows:—

1. The plaintiff is a company incorporated under the provisions of the Ontario Companies Act, having its head office at the city of Toronto in the province of Ontario, and duly licensed under the provisions of the Foreign Corporations Act for the purpose of carrying on its business within the province of Manitoba.

2. The defendants are merchants carrying on business at the city of Winnipeg in the province of Manitoba.

3. Prior to the year 1858 one Theo Noel, of the city of Chicago in the State of Illinois, one of the United States of America, had discovered a certain mineral substance containing valuable medicinal properties, deposited at a locality termed Damon Mound, in Brazoria county in the State of Texas, and spent many years in experimenting with the said mineral substance with a view of providing a merchantable

article as a medicine for divers ailments and diseases. In the year 1886 the said Theo Noel manufactured a preparation of the said mineral substance in the form of a dry powder intended to be dissolved in a prescribed amount of water for the purposes of each dose, and adopted the name of "Vitæ Ore" for the said powder, and the said preparation was largely advertised and sold by the said Theo Noel throughout the United States and the Dominion of Canada and England. It was found by the said Theo Noel from time to time that the mineral substance utilized in the said preparation was not always uniform, so that when the preparation was completed for use by the addition of water, there was in many instances a variation in colour and in therapeutic action between two apparently similar packages of the same preparation.

4. In or about the year 1895, upon more complete investigation, and with the best expert assistance he could obtain, the said Theo Noel prepared an artificial chemical compound comprising all the valuable therapeutic properties of the original ore from Damon Mound, free from the objectionable variations above mentioned. But, inasmuch as some of the customers of the said Theo Noel preferred the said original substance procured from Damon Mound, the said Theo Noel continued to manufacture and sell the said original substance under the name of "Oxidized Vitæ Ore," and commenced the sale of the said artificial product under the name of "Concentrated Compound Extract of Vitæ Ore Elixir." The sale of the above two products of Vitæ Ore (the original substance being distinguished from the artificial product by the names aforesaid) was continued exclusively by the said Theo Noel for about the period of 8 years, to wit, from the year 1895 to the year 1903.

5. In December, 1900, a company was formed by the said Theo Noel and others, and incorporated in the State of Illinois aforesaid, for the purpose of dealing with the said two products under the name of the Theo Noel Company of Chicago, Illinois, and the said Theo Noel sold and transferred to said company all his right, title, interest, and business connected with the said products of Vitæ Ore in the United States of America, and in consideration thereof received certain shares of stock issued by the said company to the said Theo Noel, but the said Theo Noel retained all his right, title, and interest in the said business, which he had

been carrying on in the Dominion of Canada and England ever since the year 1886.

6. After the said concentrated compound extract of Vitæ-Ore elixir was placed upon the market, the said Theo Noel and the said Theo Noel Company found that by far the greater proportion of orders received by them respectively from their customers in Canada, England, and the United States, were for the said concentrated compound extract of Vitæ Ore Elixir, and the said preparation came to be known to the trade generally as Vitæ Ore, and was usually ordered by said customers either by the name of Vitæ Ore or the initials V. O. For this reason the said Theo Noel in Canada and England, and the said Theo Noel Company in the United States, discontinued the long name and adopted the name of Vitæ Ore and the initials V. O. as being a simpler and more effective mode of identifying and advertising the said concentrated compound extract of Vitæ Ore Elixir, but at the same time the advertisements and literature published and distributed by the said Theo Noel and the said Theo Noel Company respectively drew attention to the said two products and enabled the customers of the said Theo Noel and the said Theo Noel Company to order either of the said preparations and obtain the same.

7. In 1902 the said Theo Noel opened an office in Toronto, in the province of Ontario, for the purpose of more effectively carrying on the business throughout Canada, which he had been carrying on for many years previously at a very large profit.

8. In or about June, 1905, the plaintiff company was formed by the said Theo Noel and others, and incorporated in the province of Ontario under the name of the Theo Noel Company Limited of Toronto, for the purpose of purchasing and taking over the business, assets, goodwill, and liabilities of the said Theo Noel in respect of the said preparations which had for many years been sold under the name of Vitæ-Ore and the initials V. O. and otherwise, and the said Theo Noel sold and transferred to the said company all his right, title, interest, and goodwill in the said business, preparations, and trade names and initials, for the Dominion of Canada, in consideration of certain shares of stock issued to him by said company.

9. In further extension of the said business so commenced and carried on by the said Theo Noel as aforesaid, a com-

pany was formed by the said Theo Noel and others, and incorporated in that part of the United Kingdom of Great Britain and Ireland known as England, under the name of the Theo Noel Company Limited of London, upon similar terms to those adopted by the said Theo Noel in organizing the said Theo Noel Company of Chicago, Illinois, and the said Theo Noel Company Limited of Toronto.

10. The said Theo Noel, during the period in which he was the proprietor of the said business in the United States and Canada and England, always maintained a stock of the said original mineral substance for sale under the name of Oxidized Vitæ Ore for any customers who might prefer that substance, and each of the said companies have always been ready, willing, and able to supply the said original mineral substance as well as the said artificial Vitæ Ore to the public, and the names "Vitæ Ore" and "V. O." have been used exclusively by the said Theo Noel and the said companies in respect of the said preparations.

11. The business done heretofore by the said Theo Noel and the said companies, so organized by the said Theo Noel as aforesaid, has been very large and profitable, and the said Vitæ Ore and V. O. preparations have acquired a great celebrity throughout the United States, Canada, and England.

12. In or about the month of March, 1906, the plaintiff company opened an office in the city of Winnipeg, and appointed the defendant R. M. Buckman its local manager at the city of Winnipeg, and the said R. M. Buckman continued to act as manager of the plaintiffs' branch at the city of Winnipeg, until in or about the month of April, 1907, when the plaintiff company decided to carry on its business in the provinces of Manitoba, Alberta, and Saskatchewan, by advertisements and by mail (a method commonly known as mail-order business), and discontinued its said office in Winnipeg.

13. Ever since the incorporation of the plaintiff company in Ontario as aforesaid, the plaintiff company has possessed and maintained the exclusive right to manufacture and sell the said "Oxidized Vitæ Ore" and "Vitæ Ore" and "V. O." preparations, and the said preparations have acquired great celebrity throughout Canada for their beneficial properties, and have been a great source of profit to the plaintiff company.

14. The defendants have recently opened an office in the city of Winnipeg, and have wrongfully, and without any

authority from the plaintiff company, advertised and sold and are continuing to advertise and sell certain preparations under the name of Vitæ Ore and V. O. preparations, in packages closely imitating and resembling the packages in which the plaintiff company has been accustomed to sell and does sell the said Vitæ Ore and V. O. preparations (including the said "Oxidized Vitæ Ore") but containing the additional words, "None genuine without the red-ink signature of R. M. Buckman," the above defendant.

15. The plaintiff company alleges, and the fact is, that the defendants have wrongfully adopted and used the name of "The Vitæ Ore Company," and have, for several months past, wrongfully and without the authority of the plaintiffs, passed off upon the public under the trade mark names of "Vitæ Ore" and "V. O." (so adopted and used by the plaintiff company exclusively as aforesaid) some preparation or preparations of their own, and threaten to continue to do so, whereby many persons are deceived by the defendants into purchasing their said preparations in the belief by such persons that they are purchasing the goods of the plaintiff company, and the defendants are endeavouring to deceive the public into the belief that the only genuine preparation of Vitæ Ore is that of the defendants.

16. The plaintiff company has suffered great loss and damage in the province of Manitoba and elsewhere throughout the Dominion of Canada as the only authorized proprietor and vendor of Vitæ Ore and V. O. preparations, and further great loss and damage will be incurred by the plaintiff company if the defendants are permitted to use the names of Vitæ Ore or V. O. in respect of their preparations, advertisements, or business.

The plaintiff therefore claims:—

1. That the defendants, their servants, agents, assignees, licensees, and employees, may be restrained by this Court from manufacturing, advertising, vending, disposing of, or trading in, any medicinal preparations under the name of "Vitæ Ore" or "V. O.," or any names resembling the same, or calculated to mislead the public into believing that the defendants' preparations are those sold by the plaintiffs under the name of "Vitæ Ore" or "V. O." respectively, and from using and trading under any name of which the words "Vitæ Ore" form a part.

1a. Delivery up, or destruction of all labels and other documents or advertisements in the possession or power of the defendants or under their control which exhibit the names "Vitæ Ore" or "V. O." in connection with the defendants' preparations.

2. An account as to the profits that the defendants have made in selling their preparations, or any of them, under the name of "Vitæ Ore" or "V. O."

3. Damages.

4. Costs of this action.

5. Such further and other relief as the nature of the case may require.

MACDONALD, J.:—This is an appeal from an order of the Referee striking out certain paragraphs of the plaintiffs' statement of claim, on the ground that the paragraphs conflict with the provisions of Rule No. 306 of the King's Bench Act.

Under Rule 306, which is the basis of our practice of pleading, pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved. Now the point at issue in this application is this: do the paragraphs struck out conflict with this Rule; are the matters therein stated a concise statement of the material facts, or is it merely an unreasonable redundancy of details that cannot be termed necessary matter of inducement? The defendants' counsel argues that the paragraphs are embarrassing because of prolixity, and, if prolixity is embarrassing, perhaps they are, but the language and form adopted by the pleader is not to my mind embarrassing. Prolixity is not embarrassing: Weymouth v. Rich, 1 Times L. R. 609.

Where no issue or one wholly immaterial to the maintenance of the action has been tendered, the pleading is embarrassing: Webb v. Hamilton Power Co., 7 O. L. R. 607, 3 O. W. R. 384.

In the case under consideration there is a clear and distinct cause of action raised, and it cannot be said that the pleading is embarrassing, and that it cannot be answered so as to raise an issue.

The pleader had very good authority for the form and matter of his pleading as in the case of Saxlehner v. Apollinaris Co., [1897] 1 Ch. p. 893, which goes into detail almost as extensively as in this case, and the English Rule is even stricter than ours.

Under that Rule every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence: Ann. Pr., 1907, p. 224.

In Saxlehner v. Apollinaris Co. no objection was raised to the form of the statement of claim, and had an objection been taken by way of motion, I am satisfied a great deal of matter would have been struck out as being in conflict with the English Rule 200. Counsel did not evidently think it worth while to raise any objection. A cause of action was made out to which a defence was entered creating a well-defined issue, and had counsel for the defence in the case here entered a statement of defence, an issue would be equally clear.

In the case of Reddaway v. Banham, 9 R. P. C. 503, being also an action for infringement of and passing off a trade mark, the statement of claim is very brief and concise, the details so prominent in the case of Saxlehner v. Apollinaris Co. being omitted, yet both cases went down to trial without any objection to the form or matter.

Kerly on Trade Marks, in referring to the pleading in Reddaway v. Banham, at p. 746, says: "This and the following pleading are taken from the report, and are probably somewhat abbreviated from the forms actually used." The practice appears to have been to go somewhat fully into the material facts intended to be proved.

In the pleadings under consideration here, however, the objection cannot be so much to the recital of facts upon which the plaintiffs rely as to the recital of unnecessary details by way of introductory averments. It is necessary, no doubt, in some cases to begin with certain introductory averments, but the record should not be incumbered with a volume of matter of that character. It is a matter more objectionable to the Court than to the practitioner, and would seem to me to be matter more for the taxing Master to take into account on taxation of costs than an objection by counsel.

There is a tendency in our practice to unduly incumber the record with irrelevant matter, and I feel that every possible effort should be made to discountenance it. There is no doubt in my mind that the statement of claim in question contains a great deal of such matter, and I think it should be expunged. I dismiss the appeal, reserving the right to the plaintiffs to amend their statement of claim. Costs to be costs in the cause.

The plaintiffs appealed to the Court of Appeal, and their appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. C. Galt, for plaintiffs.

J. E. O'Connor and H. P. Blackwood, for defendants.

PHIPPEN, J.A.:—I agree with the conclusion of the Court appealed from that the paragraphs other than 13 and 16 ordered to be struck out are not within Rule 326. Considered with the remainder of the statement of claim, paragraphs 13 and 16 do not appear embarrassing. It is true in one sense they contain statements of law, but their obvious intent is simply to sum up the previously alleged facts and shortly to allege that by reason thereof the plaintiffs have certain rights which they seek to enforce.

Mere prolixity, not such as will embarrass or delay the fair trial of an action, cannot, to my mind, ordinarily be made the basis of an order striking out portions of the pleading complained of. Possibly a pleading may so far offend against Rule 306 as to constitute an embarrassment or its filing an abuse of the process of the Court. If so, there is power to order it to be taken off the files, but I doubt our authority under our present Rules to revise pleadings which are merely over-lengthy by striking out or amending particular paragraphs in whole or in part.

In Millington v. Loring, 6 Q. B. D. 195, Lord Selborne, L. C., says: "But suppose they were not (properly pleaded), there arises the second question, had the Court, even in such a case, any power to strike the paragraph out? The answer to that question depends on Order XVII., Rule 1, which empowers the Court to strike out any matter 'which may be scandalous or which may tend to prejudice, em

barrass, or delay the fair trial of the action.'" The Lord Chancellor then holds the allegations not to come within this Rule, and says that "even assuming the statements pleaded to be unnecessary and immaterial, there is no authority to strike them out."

Shortly after this decision the English Rule was amended by giving the Court power to strike out any unnecessary matter: Wilson's Judicature Acts, 7th ed., p. 212.

As our Rule (326) corresponds with the English Rule as it stood at the time of the above decision, that judgment would appear applicable to our present practice.

But, apart from this, I fail to find where the plaintiffs at bar have alleged any substantial fact which is not material to their cause of action. Perhaps they could have stated their case in fewer words, or even omitted some minor descriptive statements, but their substantial allegations can all be properly supported by evidence at the trial, and should be proved to establish their title.

The plaintiffs set up title acquired by user, which title they ask the Court to assume from a course of dealing extending over a length of time. They might have contented themselves with a general allegation, but, had they done so, particulars would, doubtless, have been demanded, and, if so, would have been properly furnished in form somewhat similar to that of the pleading now attacked. Instead of alleging their rights in terse but general language, the plaintiffs have stated certain major facts as constituting the user from which they claim title, and the defendants' real complaint is that the general and not the particular form of pleading should have been adopted.

It does not appear to me that pleaders can be safely so restricted. Such objections, if made effective, would speedily constitute the Court special counsel to settle all vexatious pleadings. So far as a pleading is embarrassing, it should be struck out; if its excessive length so smothers the real issues as to render it embarrassing to the opposite party, it may be removed from the files; if it be a question merely of prolixity, the taxing Master will deal with it. Subject to these exceptions, it would, to my mind, be dangerous and unnecessary to limit counsel in the preparation

of pleadings which must establish a cause of action or defence based on instructions of which counsel alone can be informed, of which the Courts know nothing.

I would allow the appeal with costs, including costs both before the Referee and of the order appealed from.

RICHARDS, J.A., and PERDUE, J.A., concurred with PHIPPEN, J.A.

HOWELL, C.J.A.:—I agree with the Referee and the learned Judge who heard the appeal that the pleading is not embarrassing within Rule 326, and I also agree with them that it does conflict with Rule 306 to a certain extent, and I also think that if part of a paragraph is objectionable the whole paragraph should be struck out, rather than a portion of it, giving the pleader the right to amend. If the other course is taken, the Referee or Judge is forcing on the pleader a statement of his case perhaps different from that intended.

If pleadings are drawn in contravention of Rule 306, I cannot doubt that the Court has inherent power to correct the wrong by striking out the offending portions; still in this case, if the application had been made to me, I would not have thought the pleadings so flagrantly wrong as to induce me to make the order appealed from, but rather leave the matter to the taxing officer, with, perhaps, some directions. The order, however, having been made with leave to amend, I think the plaintiffs should have redrafted their pleading, leaving out the useless and unnecessary portions, and should not have come to this Court. I think this Court should, as far as possible, not interfere with the pleadings and practice of the Court of King's Bench, as set forth in Watson v. Rodwell, 3 Ch. D. 380, unless there is such flagrant error as in Davy v. Garrett, 7 Ch. D. 473, and Knowles v. Roberts, 38 Ch. D. 263, or some principle involved as in Millington v. Loring, 6 Q. B. D. 190.

I would dismiss the appeal with costs.

MANITOBA.

MATHERS, J. JANUARY 20TH, 1908.

CHAMBERS.

CANADA LAW BOOK CO. v. A. B.

Execution—Fi. Fa. Goods—Seizure of Books—Exemptions—Books of Professional Man—Judgment in Action upon Bill of Exchange for Price of Books Seized—Executions Act, secs. 29 (c), 36.

The plaintiffs sued on a bill of exchange given by defendant, a solicitor, for the price of books he had bought, and obtained judgment. Under writ of fi. fa. goods issued upon the judgment the sheriff seized some of the books sold for which the bill of exchange was given. The defendant averred that the books were exempt under the Executions Act, R. S. M. 1902 ch. 58, and the sheriff interpleaded. Section 29 (c) of the Act exempts the "books of a professional man," but sec. 36 provides that nothing in the Act contained shall be construed to exempt from seizure any personal estate mentioned in sub-sec. (c) the purchase price of which is the subject of the judgment proceeded upon, either by way of execution or certificate of judgment or attachment.

H. A. Burbidge, for plaintiffs.

Defendant, in person.

MATHERS, J.:—I must hold that the "purchase price" of the goods seized "is the subject of the judgment proceeded upon," within the meaning of sec. 36 of the Executions Act, notwithstanding that such judgment was recovered upon a bill of exchange drawn for the price of the books and accepted by the defendant, the purchaser. To hold otherwise would be to place too narrow a construction upon the Act. I find this is the view generally taken of similar statutes in the United States: see Black on Executions, sec. 217; 18 Cyc. 1396; 12 Am. & Eng. Encyc. of Law, p. 175; Rogers v. Brackett, 25 N. W. Repr. 601.

Five of the books seized, namely, Canadian Railway Cases, vols. 1 and 2, Masten's Company Law, Bell's Landlord and Tenant, and Ontario Digest, 1901 to 1905, are not mentioned in the list of books which the plaintiffs say are unpaid for. These are, therefore, exempt. The other books seized are not exempt.

There will be an order accordingly. As each party partly succeeds, there will be no costs.

MANITOBA.

CAMERON, J. JANUARY 27TH, 1908.

CHAMBERS.

REX v. McEWEN.

Criminal Law—Information for Carnal Knowledge of Child —Summary Trial by Police Magistrate—Election—Conviction for Lesser Offence — Jurisdiction — Evidence — Place of Offence—Habeas Corpus.

Application for a writ of habeas corpus.

An information was laid against the prisoner for carnally knowing a girl under 14 years of age. The evidence was taken before the police magistrate for the city of Portage la Prairie, before whom the charge was tried summarily with the consent of the prisoner.

In delivering judgment, the police magistrate held that there was not sufficient proof to justify a conviction on the graver charge of carnally knowing a girl under 14 years of age, but he convicted the prisoner of having committed an indecent assault, and sentenced him to be imprisoned for 15 months.

Upon the application for the habeas corpus, the grounds urged were that no opportunity was given to the prisoner to elect whether he should be tried upon the charge of indecent assault before the magistrate or of being tried by a jury, and prisoner did not consent to being tried for that offence before the magistrate; that the magistrate had no jurisdiction to convict the prisoner upon any charge other than that preferred against him; and that there was no evidence to shew that the girl was not the wife of the prisoner, or that the offence had been committed in the city of Portage la Prairie.

The statements in the evidence shewed that the offence was committed at Portage la Prairie, not specifying whether it was the city of Portage la Prairie, or the rural municipality of Portage la Prairie, and the question was raised as to whether the locality was sufficiently shewn in order to give the magistrate jurisdiction.

E. Anderson, for the prisoner, cited Regina v. St. Clair, 3 Can. Crim. Cas. 551.

George Patterson, for the Crown and the police magistrate. The Habeas Corpus Act, 31 Car. II. ch. 2, sec. 2, excepts from the benefit of habeas corpus persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution by legal process. As to jurisdiction of magistrate: a police magistrate of a city or incorporated town exercising the extended jurisdiction conferred by sec. 777 of the Code may try offences committed anywhere in the province. Habeas corpus does not lie in Manitoba in the case of a person convicted by a police magistrate exercising jurisdiction by virtue of sec. 777 of the Code, unless an absolute want of jurisdiction is shewn: Re Sproule, 12 S. C. R. 141. It was admitted that the offence charged necessarily included that of which the prisoner was convicted; therefore, under sec. 951, there was no necessity to offer a new election to the prisoner.

CAMERON, J., refused the application.

BRITISH COLUMBIA.

HOWAY, Co.C.J. JANUARY 4TH, 1908.

COUNTY COURT OF WESTMINSTER.

McLEAN v. DOVE.

Costs—Scale of—Tender before Action—Payment into Court—Recovery of $20 more than Sum Paid in—"Recovered."

Application by plaintiff for a direction as to the scale upon which his costs of the action should be taxed.

J. P. H. Bale, for plaintiff.

R. L. Reid, for defendant.

HOWAY, CO.C.J.:—In this action the plaintiff claimed $333.19 for certain cattle sold to the defendant. The defence was a plea of tender of $300, and payment of the same into Court, and not indebted as to the remainder of the claim. On the trial I gave judgment for plaintiff for $320.

The matter now comes before me on the question whether the costs shall be taxed on scale B., being the scale applicable "where the subject matter or the sum recovered exceeds $250 and does not exceed $500," or on the scale applicable to amounts "over $10 to $25." Did the plaintiff "recover" $320 or $20?

It was admitted at the trial that the tender of $300 was duly and legally made. If the amount tendered is a sum "recovered," then scale B. is applicable; but, if not, then the other scale is applicable. It has been held that the word "recovered" applies to "all cases in which the plaintiff obtains his debt or damages by means of the action:" see Cowell v. Amman Colliery Co., 34 L. J. Q. B. 161, and Boulding v. Tyler, 32 L. J. Q. B. 85.

The question, therefore, turns on the point whether money duly tendered and subsequently paid into Court, as provided by the Rules, is recoverable "by means of the action." Was it necessary for the plaintiff to bring his action to recover the $300? Manifestly not. He could have, and should have, accepted the amount tendered and gone on to trial for the balance of his claim: Bac. Abr., "Tender," 315.

"If a party takes a sum properly tendered, he does not thereby compromise his future claim for more:" Peacock v. Dickinson, 2 C. & P. 51; Mitchell v. King, 6 C. & P. 237; Sutton v. Hawkins, 8 C. & P. 259; Greenwood v. Sutcliff, [1892] 1 Ch. 1.

It is, however, contended that the plea of tender not being in bar of the action, the plaintiff, if successful, recovers the full amount, and not merely the excess. Is this so? In support of the proposition a number of authorities were cited, but, eliminating these which deal with payment into Court (a totally different matter, and governed by different considerations altogether), two cases remain pertinent to the question: Crosse v. Seaman, 10 C. B. 883, 11 C. B. 524, and Crock v. Maltby, 23 L. J. Q. B. 305. The former, a decision of the Court of Common Pleas, is opposed to an earlier decision of the Exchequer Court, Dixon v. Walker, 7 M. & W. 214, but

was followed by Wightman, J., in the latter case. In 1860 the whole question and these conflicting decisions came before the Court of Queen's Bench in James v. Vane, 29 L. J. Q. B. 169, 2 E. & E. 882. That Court unanimously held that the amount recovered is merely the excess. Speaking of Crock v. Maltby, Crompton, J., says, p. 888: "The prior decision (Dixon v. Walker) is more correct than the later" (Crock v. Maltby). Blackburn, J., in the Law Journal report, uses much the same language. The practical effect, so far as I can see, is that the two cases relied on above are overruled. They are not cited in any recent text books on the subject; they are marked disapproved in Dale & Lehman's Digest of Overruled Cases, col. 1011. It is not the practice to cite disapproved or overruled cases without explanation.

If the plaintiff had accepted the amount tendered before action, he would have recovered but $20. Shall he by refusing the tender be allowed to take advantage of his own wrong and thereby increase the costs? I think, clearly not. Is it true that in a claim for, say, $500 for goods sold, if a dispute arises as to $10, and all money except that in dispute is tendered, that dispute cannot be litigated except at the risk of costs on the scale of $500? The only cases which ever lent any support to such an outrageous contention are overruled as mentioned above.

The real matter in dispute is the excess, but the plaintiff by refusing the tender brings an action nominally for the whole sum. In such a case, as Hill, J., says in James v. Vane, "he brings his action, as to the amount tendered, causelessly, and must take the consequences of his own fault;" and Blackburn, J., adds: "It is clear that he cannot be said to recover it (i.e., the tendered money), by means of the action."

The matter is not advanced by Order 39, R. 13, as that brings us back to the question, what is the amount recovered?

Neither Order 39, R. 14, nor Order 9, R. 13, touches the point at all.

I only mention these as they were cited in the argument. So far as I can find, the Rules are silent on the point.

However, I think the principle of James v. Vane, followed in Scott Standard Tyre Co. v. Northern Wheelenes Mfg. Co., [1899] 2 I. R. 34, and cited with approval in the Annual County Court Practice, 1907, p. 69, applies, and that if

money be paid into Court with defence of tender, the plaintiff only recovers in the action the excess.

The costs will therefore be taxed on the basis of "over $10 to $25" (viz., $5 and disbursements), as the amount recovered by means of the action was but $20.

There will be no costs of this application.

BRITISH COLUMBIA.

LAMPMAN, Co. C.J. JANUARY 10TH, 1908.

COUNTY COURT OF VICTORIA.

BLAIN v. BRITANNIA SMELTING CO.

Master and Servant — Dismissal of Servant — Contract of Hiring — Daily Hiring—Wages — Deduction for Days Absent without Leave.

Action for balance of wages and damages for wrongful dismissal.

A. P. Luxton, K.C., for plaintiff.

J. H. Lawson, for defendants.

LAMPMAN, Co. C.J.:—The plaintiff in March, 1906, was engaged by the defendant company as sampling mill foreman, and he remained in that capacity until 15th August, 1907, and he now sues the company for $368, being for balance of wages and damages for wrongful dismissal from his employment without notice. He was paid last on 15th July his wages earned during June, and on his being tendered on 15th August a cheque for wages earned during July he objected to the amount as being too small, and then the circumstances took place which he says amounted to his dismissal.

Mr. Luxton contends that the hiring was a general one, and in consequence should be considered as a hiring for a year, but that the plaintiff is willing to have it taken as a monthly hiring, and he has claimed damages on that basis.

The plaintiff says he was hired at $4 a day straight, payable by the month; he also says that when he was hired, Mr. Bellinger, who was then manager of the smelter, wanted to

engage him at $120 a month, but he insisted on $4 a day straight, and that was agreed to.

Mr. Bellinger's evidence taken on commission was put in on behalf of the plaintiff: he says that his understanding was that plaintiff was to receive $120 per month, with no extra pay for overtime, but, on reading his examination, I am satisfied that his recollection of the agreement is not at all clear, and I must accept the plaintiff's own version. It was shewn by the time-sheets that plaintiff had received pay at the rate of $4 per day (he was paid for Sundays as well as week days, and also for days when the smelter was not running); for February's work he was paid $112, for April's $120, and for May $124. I should mention here that the smelter runs on Sunday. The time-sheet indicates that the plaintiff on the 15th of each month was paid for work during the preceding month an amount in dollars equal to the sumber of days in the month multiplied by 4.

I think the hiring was a daily one.

In Bain v. Anderson, 28 S. C. R. 481, at p. 484, Taschereau, J., in delivering the judgment of the Court, said: "It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered as a hiring for a year. The question is one of fact, or inference from facts, the determination of which depends upon the circumstances of each case."

In Rex v. Warminster, 6 B. & C. 77, the reasoning when applied to this case seems to me to negative the supposition that a monthly hiring was intended. There a pauper being asked how much he expected per week replied £20 per year; the employer refused to give that, but offered a certain weekly sum, which was accepted; and it was held by Abbott, C.J., that a yearly hiring was not intended. In Evans v. Roe, L. R. 7 C. P. 138, where the plaintiff agreed to accept a position as foreman of works on his receiving a salary of £2 per week and house to live in, it was held by Byles, Brett, and Grove, JJ., that the hiring was a weekly one. See also Baxter v. Nurse, 6 M. & G. 935, and Rettinger v. Macdougall, 9 C. P. 485. The effect of the word "straight" was that plaintiff was to be paid whether the smelter was running or not, and that he was not to be paid anything extra for overtime.

In July the plaintiff wanted to go to Spokane, and asked permission from the manager, Mr. Raymond; the accounts of what took place differ, but I think the understanding arrived at was that plaintiff could go for 3 days, and it would not be considered that he had lost any time. It appeared that a year before, during Mr. Bellinger's régime, he had been absent once for a period longer than 3 days, and had been paid as though present at his work all the time. The trip to Spokane took 5 days, and on 15th August the defendants in making out plaintiff's pay cheque deducted $20 for the 5 days' absence; plaintiff objected, and he says the manager said, "If you don't want to accept that, I'll stop it all." The manager says he told him he could accept the cheque or not, but if not it was the last cheque he would accept, and also that if the payment was not satisfactory he could take such steps as he saw fit.

Plaintiff refused the cheque, and, considering himself dismissed, brought his action.

Whether what the manager said constituted a dismissal entitling the plaintiff to sue for wrongful dismissal is immaterial, because of the view I take of the nature of the hiring, and the only point remaining for decision is whether or not the plaintiff is entitled to pay for the 5 days during which he was absent, or for any part thereof.

In the absence of any understanding or agreement, a daily servant is not entitled to pay when not at work, but here the company expected to pay plaintiff for the 3 days and he expected to receive the pay, but, as the absence was for 5 days, the company refused to pay for the whole 5. In this I think they were wrong; I don't think plaintiff was entitled to pay for the 5 days, but I do think he was entitled to pay for 3 days. He was a daily servant, and at the end of each day his wages for that day became vested and a debt, and if he had left without giving notice, or had been discharged for misconduct, he would have been entitled to wages up to the day of quitting or discharge, although perhaps they were not recoverable until the regular pay day. See Button v. Thompson, L. R. 4 C. P. 330, and Taylor v. Laird, 1 H. & N. 266. The manager expected to pay for 3 days, and I do not think by over-staying the 3 days' limit the plaintiff forfeited his right to recover wages for the 3 days.

The defendants have paid into Court $162, being $104 for work in July, and $60 for work in August, less $2 hospital charges (about which there is no contention). I think the payment is too small by $12. The plaintiff is not entitled to any damages.

BRITISH COLUMBIA.

CLEMENT, J. JANUARY 14TH, 1908.

CHAMBERS.

RE W. P. ELLIS & CO.

Bill of Sale—Extension of Time for Registration—R. S. B. C. 1897 ch. 32, sec. 10—Omission to Register in Time—Inadvertence—Order Extending Time—Terms—Protection of Intervening Rights.

Application by the company under sec. 11 of the Bills of Sale Act, 1905, to extend the time for registering a bill of sale.

The bargainees were a company domiciled in Toronto, Ontario, and it was impossible to forward the bill of sale to them and have the affidavit of bona fides completed and returned within the 5 days allowed by the Act.

H. C. Hanington, for the company. The document was prepared in a great hurry, and the affidavit now before the Court shews that the conveyancer who drew it up had it in his mind that the powers of the Judge were the same now as under R. S. B. C. 1897 ch. 32, sec. 10, and the amendment of 1903-4, and when forwarding the bill of sale to Toronto he wrote to the company that the impossibility of receiving back the papers within the 5 days would entitle them to an extension of time to register. The fact that the conveyancer was unaware of the limited jurisdiction of the Judge under sec. 11, as shewn by the affidavit filed, would cause the omission to register this bill of sale to be due to inadvertence within the purview of the decision in In re Jackson & Co., [1899] 1 Ch. 348, 68 L. J. Ch. 190, where it was held that the omission to file a contract pursuant to sec. 25 of the Companies Act, 1867, owing to the

ignorance of the parties of the provisions of the Act, will be deemed an inadvertence within the meaning of sec. 1, sub-sec. 1, of the Companies Act, 1898.

CLEMENT, J.:—There must be a provision protecting intervening rights: see Ehrmann Bros. Limited, 75 L. J. Ch. 817; and the order will be made on those terms.

BRITISH COLUMBIA.

CLEMENT, J. JANUARY 14TH, 1908.

CHAMBERS.

RE VICTORIA MUNICIPAL VOTERS' LISTS.

Municipal Elections—Voters' Lists—Qualification of Voters —"Householders"—Construction of Statute—Payment of Taxes—"Exempt"—Road Tax—Man over 50—Civil Servant—Pensioner—Payment of Water Rates.

Applications to strike from the voters' lists for the city of Victoria the names of 5 persons.

Higgins, for the applicants.

W. J. Taylor, K.C., for the voters attacked.

CLEMENT, J.:—Applications to strike from the voters' list for the city of Victoria the names of 5 persons, and the question as to all is: Are they duly qualified voters under the statute, 1902, ch. 20, sec. 2?

As to all but M. the question is within a still narrower compass: Are they "householders" within the statute, 1906, ch. 18, sec. 2? That section defines a householder thus: "Householder shall mean and include any person of the full age of 21 years who occupies a dwelling, tenement, hotel, or boarding house, and who shall, unless exempt by statute or municipal by-law, have paid directly to the municipality rates, taxes, or fees of not less than $2 for the current year."

Admittedly all 4 (leaving M. to one side for the moment) fall within the first branch of this definition; but it is also admitted that none of them has paid during 1907 any rate,

tax, or fee of any description to the city. It is, however, contended on their behalf that they fall within the phrase "exempt by statute or municipal by-law," and so are entitled to vote, notwithstanding the fact that they have contributed nothing to the civic treasury. I should add that the question in all these cases has reference to the "road tax" which by the Municipal Clauses Act, 1906, sec. 50, sub-sec. 117, the council of the city is empowered to impose (and has by by-law imposed) on all residents of the city between the ages of 21 and 50.

1. W. B. is a man over 50, and claims to be "exempt by statute." Counsel for the applicants contend that the word "exempt" can apply only to a person on whom a tax or impost is first or prima facie laid, and then by a clause of exception removed or remitted; and that, as under sub-sec. 117 no by-law can be passed imposing what I may call an initial or prima facie liability on a man over 50, his position is not that of an "exempt" strictly speaking. This strikes me as a piece of over-refined pedantry. "Exempt from," in the ordinary idiomatic English of to-day, means "not subject to," and, as the exemption in this case is statutory, I think W. B. entitled to remain on the list of voters.

2. E. A.'s position is the same as W. B.'s, and his name too must remain on the list.

3. J. G. B. is an official of the Dominion government. That does not make him "exempt by statute," and no municipal by-law is set up as exempting him. If he be exempt from municipal taxation, imposed under authority of a provincial Act, it is not by virtue of any statutory provision, but as a matter of public policy under our federal system: see Leprohon v. Ottawa, 2 A. R. 522, an authority very much weakened but not entirely overruled by Webb v. Outram, 76 L. J. P. C. 25. See also Fillimore v. Colburn, 28 N. S. R. 292. J. G. B.'s name therefore must be struck off.

4. J. W. M. is a pensioner of the Imperial or Dominion government. As I was not referred to, nor do I know of, any statute or by-law under which, for that or any other reason, he is exempt, his name must be struck off.

5. F. G. M. is in a class by himself. He has paid water rates to the extent of $2 or more, but has not paid his road tax. It is contended that in order to qualify as a voter under the statute, 1902, ch. 20, sec. 2, he should have paid all taxes, other than land taxes, due by him to the city. It is admitted

that the Chief Justice of this Court about this time last year decided in favour of the right to vote in cases such as this, and I do not think I should do otherwise than follow that decision, in favorem vitæ. F. G. M.'s name will therefore remain on the list.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

RE ARMSTRONG AND ST. EUGENE CONSOLIDATED MINING CO.

Arbitration and Award — Workmen's Compensation Act—Case Stated by Arbitrator—Refusal to Consider—Reference back to Arbitrator—Misdirection of Judge of Supreme Court—Proper Form of Case—Questions of Law.

Appeal by the company from an order of CLEMENT, J., upon a special case stated by an arbitrator under the Workmen's Compensation Act, referring the matter back to the arbitrator in order that he might proceed with the arbitration.

Sir C. H. Tupper, K.C., for the appellants.

L. G. McPhillips, K.C., for the respondent, Armstrong.

The judgment of the Court (HUNTER, C.J., IRVING and MORRISON, JJ.), was delivered by

MORRISON, J.:—The full Court ordered that "the special case be referred back to the arbitrator that he may make definite findings of fact, and to have the questions of law clearly formulated." Upon a reference back, the arbitrator restated the case in the following form:—

"After hearing the evidence for the applicant and respondents, and what was alleged by counsel, I find as follows:—

"1. The deceased Frank W. Smith was killed by accident on the 12th day of August, 1905, being found in a dying condition, covered with rock and muck at the bottom

of the main ore chute, as shewn on the map produced in the arbitration, which was situate on the company's premises near Moyie, B.C.

"2. The deceased Frank W. Smith was, at the time of his death, in the employ of the St. Eugene Consolidated Mining Company Limited, the respondents herein, as a shoveller.

"3. That it was his duty, in case a jam occurred in the ore chute at or near which he was working, to break the same, and if a jam did occur, as suggested in paragraph 6, it was his duty to break it.

"4. That the proper method to break the jam was to stand on a bulkhead outside of the main ore chute, and loosen the jam with a crow-bar, pick, or shovel.

"5. That on the date of the death of the said Frank W. Smith the bulkhead was protected by a partition or railing about 3 feet in height, and if deceased had remained on the bulkhead, no accident could possibly have happened.

"6. That there is no evidence whatsoever as to how the deceased came to his death, but, while there are other ways in which the accident might have happened, in my opinion the probability is that the deceased, finding a jam in the chute, at the junction of the wing chute and the main ore chute, climbed over the partition or railing into the chute, and that while he was in such position the ore jam loosened, and carried the deceased to the bottom of the chute, burying him in the rock and muck, whereby he was killed. No tools, such as shovel, pick, or crow-bar, were found in the chute.

"The questions I direct to be submitted are:—

"1. Was the death of the said Frank W. Smith caused by accident arising out of and in the course of his employment?

"2. Was the deceased Frank W. Smith guilty of serious and wilful misconduct or serious neglect?

These alleged findings came before Clement, J., who delivered the judgment appealed from, in which he rightly found that the questions submitted were questions of fact to be determined by the arbitrator, subject of course to the rule of law that findings of fact must have evidence to support them. And he in turn referred the matter back "to the arbitrator in order that he may proceed with the arbitration." The main ground raised before us is that there was no jurisdiction for this order.

The short answer to that ground is that the arbitrator has not finished his work.

The proper course in stating a case is for him to find, not only that the deceased met his death by accident, whilst in the employment of the company, as he has done, but to go further and find as facts: (a) whether or not that accident arose out of and in the course of that employment; (b) that the deceased was guilty or not guilty of serious and wilful misconduct, or serious neglect; and then allow or disallow compensation as the case might be; whereupon it could be determined, if a case were stated, whether there was evidence upon which those findings could be upheld, and as to whether the arbitrator did or did not misdirect himself.

The arbitrator is not functus officio until the award is made.

The arbitrator did not comply with the order of the Court, and the learned Judge was right in sending the matter back.

Had there been a proper case stated, then this Court doubtless could have obviated the necessity for referring it back, and thus save the extra costs entailed.

The appeal is dismissed.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

FALK v. SWENSEN.

Deed—Conveyance of Land—Rectification—Mistake in Description—Excessive Acreage—Insufficiency of Evidence upon which to Adjudge Rectification—New Trial.

Appeal by defendant from judgment of MARTIN, J., at the trial, in favour of plaintiff in an action for rectification of a deed of conveyance of land.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

E. P. Davis, K.C., and Whealler, for defendant.

J. Martin, K.C., for plaintiff.

MORRISON, J.:—The suit herein was brought to rectify a deed in which the area intended to be conveyed was, it is alleged, incorrectly described, whereby the defendant had conveyed to him some 6 1/10 acres too much.

The parcel in question is known as a portion of lot 119, group 2, New Westminster district, said to contain 82 acres, and was formerly owned by Coulthard, Malins, & Graeme, a firm of brokers in New Westminster, who sold it to one Peterson. Peterson, in 1900, by a memorandum drawn by Coulthard & Co., agreed to sell a half of this land to the plaintiff, and in that memorandum the area of that half is put at 41 acres.

On 27th February, 1902, Peterson executed a deed to the plaintiff of this half, the deed being drawn by Coulthard, who states he got the instructions from which he drew the description therein and the plan attached, from Falk and Peterson. This description thus composed by Coulthard sets out the area to be conveyed in metes and bounds with some particularity, and then triumphantly concludes by declaring that the parcel so conveyed contains 41 acres more or less. Whereas, as a matter of fact, now it is said to contain 48 acres.

In recalling Coulthard's evidence, where he says he made the description in this deed of 27th February from plaintiff's instructions, it is well to remember that on 4th February, nearly a month previously, Coulthard, or some member of his firm, drew a mortgage from Falk to a Mrs. Walker, containing this identical description. Both Peterson and Falk are foreigners engaged in fishing, and they had not the advantage of professional advice or service—Coulthard not being either a solicitor or surveyor. They seem to have relied upon Coulthard, who does not deny that he understood the land was to be divided equally into 41 acres a portion. This deed was duly registered without any correction being made in the description. In 1904 the plaintiff and defendant negotiated respecting this land, when the area was mentioned as 41 acres, and a price was fixed of $35 per acre for 41 acres. The deed was drawn containing the same description as in Falk's deed, and the money paid by the defendant. The sum of $1,400 appears in the evidence as the amount paid over, but this is explained by the fact that there were taxes and doubtless interest, etc., paid by the defendant for the plaintiff. The preponderance of evidence is that 41 acres was held out to be the area owned

by Falk, and that Swensen so understood. It is also quite certain that Swensen visited and inspected the property, before and after he got his deed, and must be held to have known pretty exactly what he was buying, and that he had no idea that the area was anything more than 41 acres, and, as he said at the trial, he does not know now that it is.

There is no evidence that a survey of the 82-acre lot was made before Swensen bought. Hill, a surveyor, whose evidence is most unsatisfactory, ran a middle line, but he only understood there were 82 acres, and that his instructions were to run a middle line, which he did, and then made a plan dividing this alleged 82 acres into equal parts of 41 acres each. Swensen, upon seeing where this centre line ran, asserted that, as it came in on some clearing which he said was on his half, the line must be wrongly run. Hill, then, for the first time, read Swensen's deed, and told him that, according to that description, the line was not in the right place, and, following Swensen's deed, Hill ran another line, and made a plan accordingly, shewing for the first time that Swensen had within his line 48 instead of 41 acres. Swensen, then, steadfastly held to his description as newly disclosed to him, and hence the action. The trial Judge gave judgment for the plaintiff, and from that judgment is this appeal.

The difficulty which presents itself at once is the lack of conclusive evidence as to the true area of the original parcel assumed to contain 82 acres. The only witness to whose evidence we can look for assistance on the point is Mr. Hill. But his evidence is so inconclusive that it is of little value. He admits that in some forgotten manner he understood that it contained 82 acres. Coulthard, who drew the deed and made the plan which appeared in all the instruments, does not know. In short, there is nothing to preclude us from assuming that upon a proper survey the parties hereto may not still have an equal division as originally intended, be that 41 acres or 48 acres.

There is no doubt the parties were ad idem as to the 41 acres. The defendant agreed to buy 41 acres. He thought he had got 41 acres. There was the exact intention of the plaintiff to sell 41 acres and the exact intention of the defendant to buy 41 acres. This intention existed mutually at the time the deed was executed.

Now, if there was precise and exact evidence which would enable us to decree the form into which the deed ought to be brought in order to set it right according to the real intention of the parties, there would be no difficulty, because the case presents all the other tests required in seeking rectification of a deed.

But on the evidence it must be said with the utmost deference that it is quite impossible to decree exactly and precisely the form to which the deed ought to be brought in this case.

Much as it is to be regretted, the case should go back for a new trial.

IRVING, J.:—I have read my brother Morrison's judgment, and agree with him that there should be a new trial on one of the grounds mentioned by him, viz., that, as the evidence does not establish what the true area of the whole lot is, it is perfectly impossible to say what property not intended to be included was in fact included in the conveyance to Swensen. There are several conclusions of fact mentioned by him to which I do not wish to be understood as assenting.

I would like the parties to this action to consider the following before they proceed to a new trial. In an action for rectification, there must be something to rectify the deed by: per Lindley, J., in Mostyn v. West Mostyn Coal and Iron Co., 1 C. P. D. at p. 154; and cf. Murray v. Parker, 19 Beav. 305, 4 Giff. 235; Bradford v. Romney, 30 Beav. 431.

In a case of this kind it is not sufficient for the plaintiff that the defendant is in possession of a greater area than he expected to buy; the Court should be able to see by the proposed rectification that one of the parties is not being deprived of the very thing he contracted for. Above all things, in cases of reforming a deed, it is essential that the extent of the proposed alteration should be clearly defined and ascertained by evidence contemporaneous with or anterior to the deed.

HUNTER, C.J.:—I concur in the view that there should be a new trial.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

REYNOLDS v. McPHALEN.

Chose in Action—Assignment of—Action by Assignee—Failure to Give Notice to Defendant—Pleading—Evidence—Amendment—Statute of Limitations—Partnership.

Appeal by defendant from judgment of HUNTER, C.J., in favour of plaintiff for the recovery of $1,109.59, being $500 principal and $609.59 interest, under a covenant contained in a chattel mortgage dated 21st April, 1886, executed by the defendant in Manitoba, in favour of the plaintiff and one William Tripp.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

A. D. Taylor, for defendant.

J. J. Russell, for plaintiff.

IRVING, J.:—The plaintiff and Tripp were horse-dealers residing in Manitoba. The defendant bought from them a pair of horses, giving therefor his promissory note and this chattel mortgage as further security.

Shortly after giving the mortgage and note, the defendant left Manitoba and went to the States, taking the horses with him. After some years he came to British Columbia.

In 1901 Tripp died, having on 2nd November, 1892, assigned all his interest under and by virtue of the chattel mortgage to the plaintiff.

On 19th June, 1906, this action was commenced. The note itself was barred, and the mortgage would expire within a month or so. The plaintiff's action was, therefore, in his own right and as assignee of the interest of Tripp.

The statement of claim alleges that the assignment by Tripp to the plaintiff was made, but does not say that notice thereof was given to the defendant, nor was such notice proved.

The first point relied upon by the appellant is that the statement of claim is insufficient in that it does not allege that notice of this assignment was given to the defendant. That notice should have been pleaded: Seear v. Lawson, 16 Ch. D. 121; Hughes v. Pump House Hotel Co., [1902] 2 K. B. 190, 197. The Chief Justice seems to have thought that this omission was no defence; that it was a matter of Manitoba law, and should have been pleaded as a fact; or if it was a defect in the pleading then the defendant had not drawn attention to the matter when he delivered his statement of defence. The defendant is not bound to give notice of this defect if it is a mere question of pleading.

The principal Rule by which all pleadings are governed is O. XIX., R. 4, which requires the material facts to be stated. This right to sue in his own name, being a right created by statute, the plaintiff must set up, and I think that is so whether the right is a right given by Manitoba law or (as I think it is) by our British Columbia Rules of Procedure.

Odgers on Pleading, 1906 ed., p. 82, the precedents in Bullen & Leake, and the judgment of Street, J., in McMillan v. Orillia Export Lumber Co., 6 O. L. R. 126, 2 O. W. R. 529, on the Ontario section passed in 1897, are authorities for the defendant's contention that the notice must be pleaded and proved.

In Durham v. Robertson, [1898] 1 Q. B. at p. 772, per Chitty, J., and Hughes v. Pump House Hotel Co., [1902] 2 K. B. 190, we read that the object of the statute in requiring notice to be given is that the debtor may know with certainty in whom the legal right to sue him is vested.

Compliance with the statute is not a mere technicality. It is a matter of substance relating to the protection of the debtor, whose liability cannot be determined in the absence of notice.

It is quite true, as Mr. Russell contends, that the statute prescribes no limit of time within which notice must be given, nor does the Act say by whom it must be given. But the language of the section contemplates that it must be given before action brought, and that it must be in writing: Bateman v. Hunt, [1904] 2 K. B. 538. This statement disposes of the points pressed upon us in argument, that notice in the statement of claim indorsed on the writ of summons could be regarded as notice to satisfy the statute, and that the defendant's action in bolting from

Manitoba prevented the plaintiff giving him notice. The proposals of settlement by him do not necessarily shew that the knowledge he had was notice in writing.

Mr. Russell's application to amend seems to me to be too late. This Court has power to amend, but that power should only be exercised with the greatest care: Shoe Co. v. Cutlam, [1896] 1 Ch. 108; and the settled rule of practice is not to allow amendments to be made which would deprive a litigant of the benefit of a defence under the Statute of Limitations: see Weldon v. Neale, 19 Q. B. D. 394; cf. Williams v. Harrison, 6 O. L. R. 685, 2 O. W. R. 1061, 1118. Leave to amend was refused in Durham v. Robertson, [1898] 1 Q. B. at p. 774, because the application was made after the trial.

I think the appeal should be allowed and the action dismissed.

MARTIN, J.:—Though the plaintiff proved an assignment in Manitoba in his favour, yet he failed to prove notice thereof to the debtor before action: Scarlett v. Nattress, 23 A. R. 297, 314. We are informed that the view taken by the trial Judge was that, the assignment being complete in Manitoba, its validity would be a question of the law of that province, which being in this Court foreign law should be proved herein as a question of fact, and therefore set up as a substantive defence, which was not done. But the appellant contends that the question of notice when brought in this Court is not one of right but of procedure only, and therefore need not be pleaded, and he relies on the case of Tolhurst v. Associated Portland Cement Manufacturers Co., [1902] 2 K. B. 660, at p. 676, affirmed [1903] A. C. 414, wherein Lord Justice Cozens-Hardy says, speaking of sec. 25, sub-sec. 6, of the English Judicature Act, 1873: "Now this section relates to procedure only." And my brother Morrison has drawn my attention to the case of Bullock v. Caird, 44 L. J. Q. B. 124, which also in principle supports the appellant's contention.

Nor is it possible to cure the defect in the plaintiff's case by the usual amendment, because the Statute of Limitations has intervened and established a right in the defendant's favour: Hudson v. Fernyhough, 61 L. J. N. S. 722; Steward v. North Metropolitan Tramways Co., 55 L. J. Q. B. 157; and Davis v. Riley, [1898] 1 Q. B. 1.

The appeal should be allowed.

MORRISON, J., (dissenting):—It seems to me that the point of this case lies in the fact that the claim here is for payment of a partnership debt, in respect of which one partner assigned his interest therein not to a stranger, but to his co-partner, and, as all contracts with partners are joint and several, the difficulty which the case at first appeared to present may be overcome.

The defendant dealt exclusively with the plaintiff, and with him concluded the contract with the firm, and after he absconded he admits he communicated with him respecting this indebtedness. Payment by the defendant to any one of the partners up to the date of the assignment would have duly discharged the debt.

By the assignment the plaintiff acquired the legal title to his partner's interest, and the only effect a notice of the assignment, if given, as regards the defendant, would be that, in order to get a discharge of his debt, he must pay the assignee alone. Without the notice he might not be so limited.

Had the claim been assigned away to some person other than the one with whom the contract was made, the case would be different.

There has been no change of title from the plaintiff, and he has now, as he has had all along, the right to its fulfilment, and payment to him will give the defendant his right to a discharge of his obligation.

As to the question of amendment. This is peculiarly a case where all the machinery of the law available should be invoked to enable substantial justice to be done as between the parties. No action is now dismissed for want of parties: Lord Macnaghten in Brandt v. Dunlop Rubber Co., [1905] A. C. 462. The defendant blandly admits his indebtedness, and that he absconded immediately after purchasing the horses in question, and withdrew to parts unknown to the plaintiff for many years. His main if not only defence on the record is directed to the question of alleged unsoundness of the horses—notwithstanding which condition he succeeded in reselling them at a satisfactory profit.

I would dismiss the appeal.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

RE VANCOUVER, VICTORIA, AND EASTERN R. W. CO. AND MILSTED.

Railway—Expropriation of Land—Obstruction of Water Supply from Spring — Compensation for—Award—Absence of Water Record—Water Clauses Consolidation Act.

Appeal by the railway company, under sec. 209 of the Railway Act, against the award of arbitrators, dated 17th June, 1907, finding that the amount of compensation to be paid to Milsted for right of way over his land was $2,950, and that the sum of $1,200 should be paid for the obstruction of the water supply from a spring situate on the land.

The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

Reid, K.C., for the company.

Brydone-Jack, for the respondent.

IRVING, J.:—The 3 arbitrators were appointed "to determine the amount of compensation payable in connection with all the estate and interest of the respondent in the lands and hereditaments therein referred to." All 3 were able to agree that the land should be allowed at $2,950, but they differed as to the compensation payable by reason of the obstruction of the spring of water situate on the said land. Two of them thought that $1,200 should be allowed in respect of the loss of the water: the third, however, came to the conclusion that the respondent was entitled to nothing, as the right to the water was vested in the provincial government, the respondent having obtained no water record. The spring in question is situate on the respondent's land, and until it reaches the dignity of a stream is as much part and parcel of the land as the sod or the trees that grow thereon. It is part of the inheritance and passes with it. After it makes for itself a course and becomes a stream, it comes within the provisions of the

Water Clauses Consolidation Act, but, even then, if application were being made by any person under that Act, the respondent's rights, in my opinion, ought to be considered under secs. 13 and 14. The judgment of the Privy Council in the Esquimalt Waterworks Case, [1907] A. C. 499, at p. 505, contains an expression from which it is to be inferred that application to the Commissioner for a record is only necessary when the person is desirous of using water in excess of ordinary riparian rights. In my opinion, the respondent has rights in the spring, and she has not lost them by failing to obtain a record under the Water Clauses Consolidation Act.

I would dismiss the appeal.

MARTIN, J.:—This is an appeal from one portion only of the award of the arbitrators, viz., that relating to the spring in question, in regard to which 2 of the 3 arbitrators find as follows:—

"And we, R. D. Rorison and A. E. Beck, do find and award in respect to the water supply, and the only water supply, on above property, that such supply is afforded by a natural spring of running water arising thereon, of excellent quality and never failing flow, and of more than sufficient capacity for the full requirements of all reasonable uses that such supply affords to a farm of the dimensions owned by Hannah Mary Milsted, and of which the said owner shall be deprived by reason of the construction of the railway by the above company, the sum of $1,200. And we further find that no water record has been granted thereon."

The third arbitrator dissents from said finding, for the following reasons:—

"And I, Frederick Howay, for myself, do find and award in respect of the said water supply, that no water record having been granted to the owner in respect of the said spring and the running stream therefrom, the owner is entitled to no compensation therefor, as the right to the said water is vested in the provincial government."

It is, at the outset, to be observed that the above are the only facts before us, and our decision must be founded thereon, and they must be taken by us to be as stated, i.e., found, by the majority of the arbitrators; nor can we speculate upon unknown conditions, or wander from the record.

According, then, to the admitted facts, the respondent was fortunate enough to have on that part of her property taken for railway purposes by the appellants a natural spring, which was the only source of a necessary and reasonable supply of water, and was of "excellent quality and never failing flow, and of more than sufficient capacity for the full requirements of all reasonable uses" for her farm.

This water supply is clearly considered by the arbitrators in its character of a "natural spring," and, though the fact is recited that it is of more than sufficient capacity for such needs, yet there is nothing to lead us to suppose that they dealt with or valued it from any other point of view, such as, for example, that of a stream as distinguished from a spring within the meaning of well known cases which are conveniently cited in Coulson on Waters, ed. of 1902, pp. 58 et seq. Nor is there anything before us that would justify our reviewing the amount of their award. Obviously such a spring would be of considerable value.

Such being the facts, the sole remaining question necessary to be determined is, whether or no such a natural spring is within the scope of the Water Clauses Consolidation Act.

Sections 4 and 5 of that Act provide that:—

"4. The right to the use of the unrecorded water at any time in any river, lake, or stream, is hereby declared to be vested in the Crown in the right of the province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake, or stream vested in the Crown, and to which there is access by a public road or reserve.

"5. No right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act."

The corresponding section in the Federal Irrigation Act, R. S. C. 1906 ch. 61, is:—

"6. The property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh, or other body of water, shall, for the purposes of this Act, he deemed to be vested in the Crown, unless and until and except only so far as some right therein, or to the use thereof, inconsistent with the right of the Crown, and which is not a public right or a right common to the public, is established.

"2. No person shall divert or use any water from any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh, or other body of water, otherwise than under the provisions of this Act, except in the exercise of a legal right existing at the time of such diversion or use."

Though it may be contended that the language in the latter section is more far-reaching than the former, yet it is clear that all bodies of water are not included therein, *e.g.*, an ordinary well. And, to my mind, it is equally clear that a spring, properly so called and distinguished from the stream which may or may not flow therefrom (that depending upon the volume of water and the character of the surrounding soil and country), is something which is unaffected by the Act.

Such being the conclusion I have reached, it is unnecessary to consider the question of the application of the Water Clauses Consolidation Act to the rights of the federal government within the railway belt in this province. And it is likewise unnecessary to seek to place an interpretation upon or to inquire into the real meaning of the introductory expression used by their Lordships of the Privy Council in the case of Esquimalt Waterworks Co. v. City of Victoria, [1907] A. C. 499, 2 M. M. C. 480, viz.: "Under this Act, a person desirous of using water in excess of ordinary riparian rights may, by a procedure which it is unnecessary to detail, obtain . . . a 'record' . . . of the water which he seeks to appropriate." I shall content myself by saying that on this language, having regard to the other sections of the Act, various plausible contentions are manifestly open to argument, quite apart from the question of obiter dictum, and the application of the rule laid down in Quinn v. Leatham, [1901] A. C. 495.

CLEMENT, J.:—In the opinion of the Privy Council, as evidenced by the dictum in the Esquimalt Waterworks case, riparian rights exist in this province, subject of course

to be diminished or even totally wiped out by a water record granted under the Water Clauses Act: see Klondyke Government Concession v. McDonald, 38 S. C. R. 79. In this case no such water record exists. The rights which the owner could, by virtue of her ownership and without any record, exercise in respect of the spring and stream upon her land to the exclusion of all others not holding water records, have been rendered valueless by the construction of the railway, and she is, I think, entitled to compensation. The arbitrators found that there was no water record at all in existence, and were therefore under no misapprehension as to the subject matter dealt with by the award, viz., the owner's riparian rights merely.

I would dismiss the appeal.

JANUARY 17TH, 1908.

BRITISH COLUMBIA.

FULL COURT.

WALSH v. HERMAN.

Foreign Judgment — Action on—Defence—No Jurisdiction in Foreign Court—Domicile of Defendant—Amendment —Statute of Limitations—Payment on Account.

Appeal by plaintiff from judgment of CANE, Co.C.J., dismissing an action on a foreign judgment.

The appeal was heard by HUNTER, C.J., MORRISON, J., CLEMENT, J.

A. D. Taylor, for plaintiff.

D. G. Macdonell, for defendant.

HUNTER, C.J.:—Action on a foreign judgment for $350.13, recovered by the plaintiff against the defendant on 23rd January, 1906, in Ontario. The writ of summons was served on the defendant personally in British Columbia, but he entered no appearance, and the judgment went by default. Two defences were raised: first, that at the time

of the issue and service of the writ he was neither resident nor domiciled in Ontario; second, that recovery on the note on which the judgment is founded was barred by the law of Ontario at the time the writ issued.

As to the first defence, I think it is good, as the Courts of Ontario do not appear to have had any jurisdiction over the defendant. It is not in dispute that the defendant left Ontario in 1899, and, after staying 6 months in Winnipeg, went on to Vancouver, where he has remained ever since, and, while the evidence is meagre, I think the proper inference is that he had acquired a British Columbia domicile before the issue of the Ontario writ. The case is not one where the party is alleged to have acquired a foreign domicile, but where he has merely shifted from one British jurisdiction to another under the same general government; and the circumstances which would warrant the inference of a change of domicile within British dominions only, would not necessarily warrant the inference of a change to a foreign domicile. If, then, he had changed his domicile, the Ontario Court clearly had no jurisdiction: Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670; Deacon v. Chadwick, 1 O. L. R. 346; Vézina v. Will H. Newsome Co., 14 O. L. R. 658, 10 O. W. R. 17; Emanuel v. Symon, 24 Times L. R. 85.

It is not necessary in this view to consider the second defence.

With reference to the plaintiff's application to amend made at the trial and renewed before us, it appears that the original cause of action has long since been statute-barred, and that the plaintiff's only hope of success is in having the $25 payment made by defendant as detailed in the evidence held to be a payment on account of the original indebtedness. But the trial Judge evidently considered that the payment in question was made under such circumstances as to rebut any implied new promise on the defendant's part to pay the balance of that original indebtedness: and, in my opinion, we cannot on the evidence say that what transpired was anything more than a conditional offer to compromise, which was declined. That the circumstances surrounding a payment such as was made here may rebut the implication seems clear: see Friend v. Young, [1897] 2 Ch. 421, in which Stirling, J., collects the cases.

Moreover, the payment in this case was made after writ issued in this action, and Bateman v. Pinder, 11 L. J. Q. B.

281, is clear authority, not weakened so far as I am aware by any subsequent decision, that such a payment cannot operate to defeat a plea of the statute.

Appeal dismissed with costs.

MORRISON, J.:—Plaintiff sought to recover from the defendant the sum of $350 on a judgment obtained in the District Court of Rainy River, Ontario, on 23rd January, 1906.

On 25th April, 1898, the defendant signed a promissory note for $240 in favour of the plaintiff, at Kenora, in the said judicial district, which fell due in two months, viz., 25th June, 1898. At that time the parties were both domiciled and resident in Ontario. The defendant left Ontario in 1899, and in that year took up his residence in Vancouver, where he has resided ever since.

On 19th December, 1905, the writ in the Ontario action was issued and served on the defendant in British Columbia, but he did not enter appearance in that action. Judgment was in due course entered, and an exemplification thereof forwarded to British Columbia, and suit commenced thereon in January, 1906. The defendant in his defence alleges that at all material times he was domiciled and residing in British Columbia; that neither at the time of the commencement of the suit in Ontario, nor at any time during its continuance, was he resident or domiciled in that province or subject to the jurisdiction of its Courts; that he did not appear to that suit, nor agree to submit to the jurisdiction of the Ontario Courts, and the judgment of that Court was in consequence not binding on him.

Upon the trial in the County Court of Vancouver on this judgment, it was given as evidence by the plaintiff that the defendant had made a certain payment after the British Columbia action was commenced, which the plaintiff alleges was a payment on account of the claim which by the way the defendant alleged in his defence was barred by the Statute of Limitations of Ontario. There is a conflict of evidence on this matter, and, although the learned Judge did not give any reasons for the judgment which he gave in favour of the defendant, it is clear he found on this point as a fact in favour of the defendant.

The point of the appeal, however, which was particularly and forcibly raised, is that under the above circumstances the judgment of the Ontario Court is binding here.

In Emanuel v. Symon, [1907] W. N. 23rd November, reversing Mr. Justice Channell's judgment in the same case, [1907] 1 K. B. 235, the effect of a foreign judgment was fully considered by the Court of Appeal. Lord Justice Buckley in the course of his judgment says that in actions in personam, there are 4 cases in which the Courts will enforce a foreign judgment: (1) where the defendant was a subject of the foreign country in which the judgment was obtained; (2) where he was resident in the foreign country when the action began; (3) where the party as plaintiff subjected himself to the jurisdiction by beginning the action in that country; (4) where he had contracted with the other party to submit to the forum in which the judgment was obtained.

The defendant here does not come within any of those cases. The only ground left to the plaintiff seems to me to be the proposition that the Courts of Ontario have jurisdiction over the defendant in respect of an obligation made by him whilst he was a resident in that province—which proposition cannot be maintained in view of Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670. Nor does the case of Becquet v. McCarthy, 2 B. & Ad. 451, help him, for the Court of Appeal has just held that that case cannot now be considered good law. Apart from that the facts were not the same in that case as in this, for there the defendant was shewn to have owned real property in the foreign country, which circumstance apparently led to the contention on the plaintiff's part as to the existence of jurisdiction on that account.

In the recent case of Vézina v. Will H. Newsome Co., 14 O. L. R. 658, 10 O. W. R. 17, it was held that the defendant company not having had any office or agent in the province of Quebec at the time when the cause of action arose, or when they were served with the writ of summons, the judgment obtained there must be treated as a nullity in the Courts of Ontario.

Here there is an entire absence of evidence that the defendant in any way was subject to the jurisdiction of the Ontario Courts from the commencement of the action in the Courts of that province until the present time.

The appeal should be dismissed.

CLEMENT, J., concurred.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

CORTESE v. CANADIAN PACIFIC R. W. CO.

Railway—Animals Killed on Track—Dominion Railway Act. R. S. C. 1906 ch. 27, sec. 254. sub-sec. 4—Obligation to Fence—"Locality"—Interpretation—Onus.

Appeal by defendants from judgment of WILSON, Co. C.J., 6 W. L. R. 49, in favour of plaintiffs.

The appeal was heard by HUNTER, C.J., MORRISON, J., CLEMENT, J.

E. P. Davis, K.C., for defendants.

W. E. Burns, for plaintiffs.

HUNTER, C.J.:—In this case the trial Judge had a view, and came to the conclusion that the lands lying outside of the city limits, including the lands in question, could not be classed per se as a settled or inclosed locality, but, as he considered them to be part of the "locality" of Fernie, he gave judgment for the plaintiffs. In this I think he was in error. Lands within the limits of a municipality other than a rural municipality are obviously governed by wholly different conditions from lands without those limits. Suppose there had been a rural municipality adjoining Fernie embracing the lands in question, I apprehend no one would ordinarily speak of them as being in the locality of Fernie, unless he meant by that to describe them as being in the neighbourhood of Fernie. But "locality" is obviously not used in the sense of neighbourhood, but to describe a portion of territory larger at any rate than a single homestead or farm. I agree with the trial Judge that the onus is on the company in this class of case to shew that they are not liable to fence, and I think that the legislature, by the use of the elastic word "locality," intended to leave it to the Court to say in the particular case, having regard to all the circumstances, whether the company should have fenced. And I think that the word "either" is used distribu-

tively; that, for instance, the Court could say, where there is a settled valley on one side of the line and a vacant mountain on the other, that the railway company might, in the circumstances, fulfil their obligations if they fenced only on the valley side of the line. Here I think the trial Judge went wrong in considering that "locality" means neighbourhood or vicinity; and, as his finding of fact that the locus in quo could not by itself be classed as a settled or inclosed locality, has not been successfully assailed, the appeal should be allowed and the action dismissed with costs.

MORRISON, J.:—The point of this appeal is as to the construction of sub-sec. 4 of sec. 254 of the Railway Act, R. S. C. 1906 ch. 27.

The sub-section reads as follows: "Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates, and cattleguards, unless the Board otherwise orders or directs."

The plaintiff owns and occupies land situate about a half mile from the corporate limits of the mining town of Fernie, in East Kootenay, and adjoining the defendants' railway track.

In August last some hogs and goats of the plaintiff were killed by the defendants' train opposite the plaintiff's said lands.

The matter in dispute came before the County Court Judge on a case stated. The findings therein are not as explicit or precise as one would wish, but, taking them as they are, together with the Judge's findings after a view, in my opinion it is quite clear that the lands in question were not inclosed as contemplated by the Act. Apart from the meaning which he attached to the word "locality," he does not doubt that the defendants are entitled to invoke the above provision of the Act. So that the question is reduced to the meaning of the word "locality," and so counsel argued before us.

The Judge holds that the plaintiff's lands, on account of their proximity to the town of Fernie, are in what he terms the "settled locality of Fernie." I do not think the word "locality," as used in the Act, can be applied to an incorporated town. The section in no way applies to an incorporated town or city, and it is not permissible to read into this section any such limitation as stated by the Judge.

Parliament gave the Board of Railway Commissioners the power to order fences to be built in localities, such as this one, which are within the meaning of sub-sec. 4, and which are contiguous to towns or other densely settled communities. There is, of course, no suggestion that in this instance any such order was made.

In this case, having regard to the whole of sec. 254, and the power in sub-sec. 4 given to the Board to order fences to be built, the word "locality" must be construed without any reference to the proximity of those lands to the town of Fernie.

The appeal is allowed with costs.

CLEMENT, J.:—Apart from the difficulty there is in fixing what area is covered by the word "locality," a meaning must be found, if possible, for the adjectival phrase "in which," &c.

To begin with the words "the lands:" Do they mean "all the lands?" That is to say, must all the lands fall within the category of lands not improved and inclosed or not settled or inclosed before the railway company can claim exemption from the burden of fencing? I think they must, as there seems to be no warrant for, or method of, fixing any less proportion as sufficient. It is, perhaps, idle to speculate as to the reason why the legislature should insist that the whole area, whatever it may be, embraced within the "locality," should consist of lands not settled, &c. One can only suggest that if in the "locality" any of the inhabitants have found it necessary to fence their dwellings and crops against cattle and other animals, the public travelling through that same "locality" must be taken to need protection "to prevent cattle and other animals from getting on the railway," as it is expressed in sub-sec. 2.

Then again, the expression "on either side of the railway" is one not easy of interpretation; but, on the best consideration I can give to it, I think "either side" is an ordinary English idiomatic expression meaning "both sides," and that the whole phrase is not limited to lands actually contiguous to the right of way. I am led to this latter conclusion chiefly by the presence of the word "inclosed," which is not in any way applicable to a piece of land one side of which abuts upon an, ex hypothesi, unfenced right of way.

On the facts set out in the special case, I am of opinion that the "locality" through which the railway runs at the

point in question here, is not such a locality as is referred to in sub-sec. 3 of sec. 199, as I read it. I am not, indeed, prepared to say that the County Court Judge has placed too large an area within the "locality," or that he was wrong in finding that that "locality" embraces within its bounds the southerly outskirts of the city of Fernie. But, be that as it may, it is quite clear on the facts that a much smaller area might have been taken as forming the "locality" proper to be considered here, without bringing it within the exemption clause. It appears from the stated case that on the ranch itself in question here, there was at the time of the occurrences complained of an enclosed potato patch of some three-quarters of an acre.

Regard must be had to the fact that the obligation to fence is imposed, as above indicated, to keep cattle—animals of a well-known roving tendency—off the track.

I would dismiss the appeal.

Appeal allowed, CLEMENT, J., dissenting.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

DE LAVAL SEPARATOR CO. v. WALWORTH.

Company—Extra-provincial Corporation—Non-registration—Carrying on Business—Goods Forwarded to Agent for Sale—Promissory Notes Given for Price—Principal and Agent—Statute Penalizing the Carrying on of Business by Non-registered Companies—Effect on Contracts.

Appeal by defendant from judgment of HUNTER, C.J., 13 B. C. R. 74, 6 W. L. R. 50.

The appeal was heard by IRVING, MORRISON, and CLEMENT, JJ.

Joseph Martin, K.C., and Craig, for defendant.

E. P. Davis, K.C., and Barker, for plaintiffs.

IRVING, J.:—In my opinion, this appeal should be dismissed. The plaintiffs' cause of action is that the defendant has received money for them. As a general rule, persons who enter into dealings forbidden by law must not expect any assistance from the law. This is the case not only in contracts, but also in cases of tort: see Fiaz v. Nicholles, 2 C. B. 501, 513; but the general rule is not applied so as to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. The cases are collected in Pollock, p. 362. Even if the money is paid to him in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal: Bonsfield v. Wilson, 16 M. & W. 185.

In this case the agency business had stopped or been abandoned, and the defendant settled up his accounts with the plaintiffs by giving the notes sued on.

MORRISON, J., concurred.

CLEMENT, J.:—The defendant insists that he was the plaintiffs' agent. As such—taking him at his word—he received to their use the moneys represented by the notes sued on. He cannot, in my opinion, set up as against his principals that the moneys were received by him as the proceeds of illegal sales made by him. In addition to the cases cited by Mr. Davis on this point, I refer to Bonsfield v. Wilson, 16 L. J. Ex. 44; Sharpe v. Taylor, 2 Phil. 801; Williams v. Tyne, 23 L. J. Ch. at p. 863, per Lord Romilly, M.R.; and De Mattos v. Benjamin, 63 L. J. Q. B. 248. I can see no principle on which it can be said that the contract between the plaintiffs and the defendant by which he was appointed their agent was itself illegal. The making of that contract was not "carrying on business," nor did it necessarily contemplate or involve an illegal carrying on of the company's business.

These considerations differentiate this case, in my opinion, from those in which the contract sued on was a contract entered into in evasion of statutory law, such as (e.g.) Booth v. Hodgson, 6 T. R. 405; Knowles v. Houghton, 11 Ves. 168; Battersby v. Smyth, 3 Madd. 110. Such contracts the Court will not enforce. See also Sykes v. Beaven, 11 Ch. D. 170.

I would dismiss this appeal with costs.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

NORTH-WESTERN CONSTRUCTION CO. v. YOUNG.

Company—Extra-provincial Corporation—Non-registration—Carrying on Business—Companies Act, sec. 123—Construction—Prohibitive Enactment—Action on Contract.

Appeal by defendant from judgment of CANE, Co. C.J., in favour of plaintiffs in an action to recover the balance of the price of a quantity of building stone delivered by plaintiffs to defendant, pursuant to a contract between the parties.

The appeal was heard by IRVING, MORRISON, and CLEMENT, JJ.

Joseph Martin, K.C., and Craig, for defendant.

E. P. Davis, K.C., and Barker, for plaintiffs.

MORRISON, J.:—The point involved in this appeal is whether sec. 123 of the Companies Act, R. S. B. C. ch. 44, prohibits the making of contracts within British Columbia, by unregistered and unlicensed extra-provincial companies.

The plaintiffs, an unlicensed extra-provincial company, carrying on business within the province, entered into a contract with the defendant to deliver building stone for use in the city of Vancouver. The claim in the action is for the balance due on that contract, and the defence set up is that the contract is illegal and void by reason of the 123rd section of the Act.

The County Court Judge who tried the case gave judgment for the plaintiff, following the judgment of the Chief Justice in Delaval Separator Co. v. Walworth, 13 B. C. R. 74, 6 W. L. R. 50, on this branch of the case.

Upon a comparison of sec. 123 with the various enactments in respect of which the numerous cases cited in support of the plaintiffs' contention arose, a material difference of phraseology will be found. If this difference in the form of the language is kept in view, the force of those authorities as applied here may well be doubted.

Take for instance, Smith v. Mahood, 14 M. & W. 452. The question turned on the construction of secs. 25 and 26 of the Excise License Act, 5 Geo. IV. ch. 81. Section 25 required the tradesman to place his name, of a certain length and size of letter, over the door of his place of business, and in default he was to forfeit a penalty. Section 26 imposed a penalty upon every dealer in a certain commodity who did not take out the prescribed license. In Learoyd v. Bracken, 1 Q. B. D. 114, the Stamp Act in question required every one who made or executed any contract note chargeable with duty and not duly stamped to forfeit a penalty. The forfeiture of the penalty in these cases was, of course, held to be the only consequence following default of compliance with the statutory requirements. And so a line of cases, including Brown v. Duncan, 12 Q. B. D. 905; Wetherell v. Jones, 3 B. & Ad. 221; Johnson v. Hudson, 11 East 180; Foster v. Oxford R. W. Co., 13 C. B. 200.

On the other hand, take sec. 123 of our Companies Act. It reads as follows: "Unless otherwise provided by any Act, no extra-provincial company having gain for its purpose and object, shall carry on any business *within* the scope of this Act in this province unless and until it shall have been duly licensed or registered under this Act, and thereby become expressly authorized to carry on such of its business as is specified in the license or certificate of registration, and no company, firm, broker, or other person shall as the representative or agent of, or acting in any other capacity for, any such extra-provincial company, carry on any of its business *within* this province until such company shall have obtained such license or certificate of registration; and any such company which fails or neglects to obtain such license or certificate of registration shall incur a penalty of $50, recoverable upon summary conviction for every day during which it carries on business in contravention of this section; provided that this section shall not apply until the first day of January, 1898, to any extra-provincial company carrying on business within this province on the date of the passage of this Act, and further provided that proof as to compliance with this section shall at all times be upon the company."

The language is imperative that no unregistered or unlicensed extra-provincial company shall carry on any business. That is, if it is not licensed or registered, "it is not a company the law will recognize. It is illegal in that sense. It is a

prohibited thing, and the law cannot take notice of it except perhaps in a penal point of view:" per Lindley, J., in In re Padstow Total Loss, &c., Assurance Association, 51 L. J. Ch. at p. 353.

The words of the section are plain and apt, and to my mind convey the clear intention of the legislature to prohibit any act of business within the jurisdiction of unlicensed or unregistered extra-provincial companies; to prevent them from entering into any business obligations here.

Before an extra-provincial company has any legal status in the province, it must be, as it were, reincorporated here. There is no such entity known here as an unlicensed extra-provincial company. Unlike the enactments whose construction was involved in the cases cited by the plaintiffs' counsel, where individuals and concerns were excluded from transacting certain specified kinds of business, sec. 123 does shut out a certain class from transacting in any way any kind of business of whatsoever nature; the object of the legislature being to protect the public, by compelling those companies seeking to come and do business within the province to disclose the scope and nature of their powers. For, by sec. 127 of the Act, they must first file a true copy of their charter and regulations, shewing that they have authority to carry on business in British Columbia, and that they are in existence and legally authorized to carry on business under their charters. The judgment of Buckley, J., in Victoria Syndicate v. Dott, [1905] 2 Ch. 630, approved in Bonnard v. Dott, [1906] 1 Ch. 740, is very much in point.

If the provision is not prohibitive, then it must be held that the company may continue to transact business, and in so doing the only consequence would be the forfeiture of the penalty. It is conceivable, then, that a company could well afford to pay the penalty and not register. But suppose the section did not impose a penalty, could it still be contended that there was no consequence following a violation of the enactment? Surely not. See remarks of Bowen, L.J., in Melliss v. Shirley Local Board, 16 Q. B. D. 454.

Although the point was not raised before us, I am constrained to ask how the imposition of the alleged penalty here can be effected? Was it really the intention of the legislature to retain this part of the section, which may have been left over from the old Act by inadvertence of the draftsman. But, assuming the existence of a penalty, then the object is to punish the offending company, and it implies a prohibition

so as to render the contract void: Mitchell v. Smith, cited in Smith v. Mahood, 14 M. & W. 452. And if the intention of the legislature was to prohibit the doing of any act of business, it makes no difference whether it is for revenue purposes or not, there may be prohibition rendering a contract void even for revenue purposes: Smith v. Mahood, supra. Still the scope of the whole Act precludes the notion that the section is merely a revenue regulation.

This is not a case where an Act creates an obligation and provides for the enforcement of it in a specified manner, in which case the rule is that performance cannot be enforced in any other manner: Doe dem. Bishop of Rochester v. Bridges, 1 B. & Ad. 847. Cases of that kind presuppose the company to be existing and properly domiciled in the jurisdiction. In the case before us there is no obligation imposed on an extra-provincial company which is not licensed. The obligations attach when it is properly licensed, whereupon it becomes recognized, having a status to receive the protection of the State, as well as to subject and submit itself to the jurisdiction. It does not follow that the plaintiff company would be licensed in any event upon application. And, if not licensed, how can it be ascertained whether the objects of the company are or are not lawful, or that in fact it has any corporate existence. Is it in any worse position after being refused a license than it is in acting without applying for one?

Further, the section does not seek to regulate a company already authorized to do business here. It is in this respect that so many if not all the cases relied on by the plaintiffs' counsel can be differentiated.

The legislature by the Companies Act provides for certain artificial creations (as Lord Halsbury puts it in Salomon v. Salomon, [1897] A. C. 29), called companies. And those companies obviously must be brought into existence before attempting the performance of any functions. Those contemplated by our legislature may be roughly divided into two main classes, viz., provincial or domestic and extra-provincial or foreign companies. It again is obvious that the main, if not sole, object of those creations, is the transaction of some kind of business for gain. And whether a company coming under either class has been validly created or not, can be determined by reading the Act and applying the ordinary canons of construction. In this case that can be done, and

the construction contended for by the defendants' counsel be supported, without adding to or taking from the requirements of the statute, or violating the general principle followed in Bank of England v. Vagliano, [1891] A. C. 107, or Salomon v. Salomon, supra. As in the case of provincial or domestic companies, there is no legal entity, no legal existence, until evidenced by incorporation as provided by the Act, so in regard to extra-provincial or foreign companies there is no legal entity or legal existence, until registered or licensed or reincorporated pursuant to the Act.

A word as to Bensley v. Bignold, 5 B. & Ald. 335, upon the reasoning in which the Chief Justice threw some doubt in Delaval Separator Co. v. Walworth. In view of the fact that this leading case has been cited with approval in England and in Canada at least down to so recent a time as the case of Brown v. Moore, 32 S. C. R. 93, I cannot help concluding that it may be safe to assume it is still good law.

It seems then clear that this action must fail because the act to be done pursuant to the contract is prohibited, and the contract is therefore unenforceable: Cope v. Rowlands, 2 M. & W. 155; Smith v. Mahood, 14 M. & W. 452; Staffordshire Financial Co. v. Hunt, [1907] W. N. 258.

The appeal should be allowed with costs.

CLEMENT, J.:—Touching the question of their prohibitive effect, penal statutes may be grouped into four classes:—

A. Those which simply forbid the doing of a thing without more; e.g., In re Padstow, &c., Co., 51 L. J. Ch. 344; Jennings v. Hammond, 51 L. J. Q. B. 493; Shaw v. Benson, 52 L. J. Q. B. 575; in all of which the thing prohibited was held illegal.

B. Those which forbid the doing of a thing under penalty for doing it; e.g., Bensley v. Bignold, 5 B. & Ald. 335; Stephens v. Robinson, 2 Cr. & J. 209; Gas Light, &c., Co. v. Turner, 9 L. J. C. P. 75, 9 L. J. Ex. 336; Meliss v. Shirley Local Board, 55 L. J. Q. B. 143; Brown v. Moore, 32 S. C. R. 93; in all of which also the thing prohibited was held a thing illegal, out of which no right of action could arise. The case at bar falls within this class.

Foster v. Oxford R. W. Co., 22 L. J. C. P. 99, appears at first sight to be opposed to this current of authority. If really so, it cannot, in my opinion, stand in the face of Meliss v. Shirley Local Board, ubi supra. It was relied on by Cave, J., in the Court below, 54 L. J. Q. B., but was apparently treated as distinguishable in the Court of Appeal. The words "no director shall be capable of being interested in any contract" were held in Foster's Case not to be prohibitive of the contract; in Meliss's Case the words were "officers employed by the local authority shall not in anywise be concerned or interested in any bargain or contract," and these words were held to be prohibitive of the contract, rendering it illegal.

C. Those which command a thing to be done under penalty for not doing it; e.g., Cope v. Rowlands, 6 L. J. Ex. 63; Fergusson v. Norman, 8 L. J. C. P. 3; Cundell v. Dawson, 17 L. J. C. P. 311; Ritchie v. Smith, 18 L. J. C. P. 9; Victoria, &c., Co. v. Dott, 74 L. J. Ch. 673; Bonnard v. Dott, 75 L. J. Ch. 446; in all of which the failure to obey the statute was held to render the contract illegal; and Smith v. Mahood, 15 L. J. Ex. 149; Wright v. Horton, 56 L. J. Ch. 873; Attorney-General v. Bradlaugh, 54 L. J. Q. B. 205; Learoyd v. Bracken, [1894] 1 Q. B. 114; in which the liability to pay the penalty was held to be the only consequence attending a disregard of the statutory requirements.

D. Those which enact a penalty simply for doing or not doing a thing without words of express prohibition or command; e.g., Taylor v. Crowland Gas Co., 23 L. J. Ex. 254; Barton v. Piggott, 44 L. J. M. C. 5; in both of which the act done was held illegal, giving rise to no right.

It is only in respect of classes C. and D. that any question of interpretation can really arise. Only where the intention of the legislature as to the exact matter in question has to be sought by implication, is it necessary and proper to consider the scope and policy of the enactment; whether, for example, the Act is one passed for revenue purposes merely or for other purposes of public policy as well. But such considerations can have no place where the enactment is clothed in words which in their usual grammatical meaning are words of express prohibition. Such words, in my opinion, we have here: "No extra-provincial company . . . shall carry on any business . . . unless and until," &c.

It is hard to imagine more precise and unambiguous language. The performance by the plaintiff company of the contract sued on was in its every step a carrying on of their business in British Columbia, without the required license or registration, in clear disregard of a statutory prohibition, and being therefore illegal can give rise to no right of action against these defendants.

As the view I take is opposed to that expressed by the Chief Justice in De Laval Separator Co. v. Walworth, 13 B. C. R. 74, 6 W. L. R. 50, it is, I think, due to him, as well as to the County Court Judge below, to say that Brown v. Moore, ubi supra, which appears to me to be directly in point and decisive of this case, was not cited to either of them. It should, also, I think, be noted that the dicta of Sir George Jessel, M.R., and Brett, M.R., upon which the Chief Justice relied, cannot be taken as accurate statements of general law, if the cases grouped above in classes B. and D. were correctly decided; and they are not, moreover, in accord with the decision in several of those grouped in class C., notably the recent money-lenders' case in the Court of Appeal, Bonnard v. Dott, ubi supra. The dictum of Brett, M.R., was uttered in January, 1885, and may have been in his mind when he gave judgment in the following December in Meliss v. Shirley Local Board, ubi supra—"After struggling against the conclusion to which I have been obliged to come:" see 16 Q. B. D. at p. 451.

The enactment in question here, treated as conditionally prohibitive legislation, is, I think, intra vires of the provincial legislature, not having relation to "trade and commerce:" see the Parsons Case, 7 App. Cas. 96, and the Local Prohibition Case, [1896] A. C. 348; but rather to "property the civil rights in the province."

I would allow the appeal with costs and dismiss the action as against all defendants with coses: see Challoner v. Lobo, 1 O. L. R. 292.

IRVING, J.:—I have had an opportunity of reading the exhaustive judgment of my brother Clement. In my opinion, this statute is to be decided by the ruling in Brown v. Moore, 32 S. C. R. 93, as the Act in question here has a prohibition in express terms, and a penalty for contravention.

I would allow the appeal.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

JULL v. RASBACH.

Vendor and Purchaser—Contract for Sale of Land—Want of Authority of Agent of Vendor—Incomplete Contract—Correspondence—Specific Performance Refused.

Appeal by defendant from judgment of MORRISON, J., in favour of plaintiff in an action for specific performance of a contract for the sale of land.

The appeal was heard by HUNTER, C.J., IRVING, J., CLEMENT, J.

Joseph Martin, K.C., and J. A. Russell, for defendant.

A. D. Taylor, K.C., for plaintiff.

HUNTER, C.J.:—This is an action for specific performance of an agreement for the sale of land entered into between the plaintiff and one Coldwell, a real estate broker, alleged to have been the duly authorized agent of the defendant.

On 31st May, 1904, the defendant listed 4 out of the 5 lots in question, together with other properties, with the firm of Coldwell & Pothonier, real estate brokers, with instructions to them to put a value on them and return the list to him so that he might look it over and make any change he thought desirable. About a year later, in a letter to the firm, he, amongst other things, inquires what the prospects are for the property in question. In April, 1906, he writes saying that he hardly thinks it advisable to sell just then, but asks what price they think he should get. In May of that year Coldwell brought the property to the notice of the plaintiff, whereupon the following memorandum was finally drawn up:—

"Vancouver, B.C., May 17th, 1906.

"Received from T. F. Jull . . . the sum of ten . . . 00/100 dollars, being a deposit on lot 10 block 28, lot 2 block

31, lot 3 block 31, lot 7 block 34, lot 11 block 53, all in district lot 540. Purchase price $1,000, terms ¼ cash, bal. 6, 12, and 18 months, subject to the owner's approval.

$10.00 "Jos. A. Coldwell,
"Agent for C. Rasbach."

On the next day Coldwell wired the defendant as follows:—

"Vancouver, B.C., May 18th, 1906.

"Charles Rasbach,
"Herkimer, N.Y.

"Offered thousand quarter cash six twelve and eighteen months for five lots in five forty reply. J. A. Coldwell."

To which the defendant replied:—

"Herkimer, N.Y., May 19th, 1906.

"J. A. Coldwell, 100 Hastings St.,
"Vancouver, B.C.

"Decided to hold but would take twelve fifty same terms. C. Rasbach."

And on the same day wrote as follows:—

"J. A. Coldwell.

"Dear Sir.—Telegram just received; have wired you would take $1,250. I had made up my mind not to sell these lots at present, as they and two in Hastings townsite are the only ones I have left in Vancouver, B.C. I don't think property will ever be any lower in the city. This price would hold good for only a short time; two or three others have been in correspondence with me in regard to these lots.

"Yours respectfully,
"C. Rasbach."

Shortly after the receipt of Rasbach's telegram of the 19th, Coldwell communicated its contents to Jull, who agreed to the $1,250, and Coldwell, with Jull's assent, altered the receipt accordingly, the words, "subject to the owner's approval" also being struck out.

On the 21st Coldwell wrote to the defendant as follows:—

"Vancouver, B.C., May 21st, 1906.

"C. Rasbach, Esquire,
"Herkimer, New York.

"Dear Sir.—My telegram to you offering $1,000 for five lots in District Lot 540. Yours to me as follows decided to

hold but would take twelve fifty same terms, signed C. Rasbach. My telegram of same date to you five lots sold as per your telegram, letter following signed J. A. Coldwell.

"The terms in first telegram were ¼ cash, bal. in 6½ and 10 months. Interest at 7% per annum.

"I enclose the agreement signed by Jull; please execute them and go before a Judge of a Court of Record having a seal with the blue form enclosed, and have your signature properly attached, and please also initial the corrections. Then return one to us or through our bank, which is the Bank of Hamilton, and we will pay to your order the sum of $233.50—that is your portion of taxes to time of sale $16.50, and commission $62.50, making a total of $312.50.

"I will find out about the different properties you state in your letter of May 12th and will let you know.

"Yours resp.,

"Jos. A. Coldwell.

"Notice they have deducted amount of taxes."

On the 26th Rasbach wrote as follows:—

"Herkimer, N.Y., May 26, 1906.

"J. A. Coldwell.

"Dear Sir.—I have just received to-day an offer of nearly your offer for three of the lots in 540, lot 10, block 28, and lots 2 & 3 in 31; the offer was $300 each, $900. When this property is sold I hope you will be the one who can have the commission. What do you think of this offer? I will write the parties; they can have the 3 for 1,000 or 5 for 1,600.

"Yours resp.,

"C. Rasbach.

And again on the 29th as follows:—

"Herkimer, N.Y., May 29, 1906.

"J. A. Coldwell.

"Dear Sir.—I have just received this morning your letter and agreement of the 21st, which I am returning. I received but one telegram from you offering $1,000 for the lots, and I immediately answered and received no reply until this morning. Last Saturday I received letter from another party offering me $900 for the 3 lots, lots 1, 2, & 3. I wrote them the same as I did you, stating I would accept $1,000 for the 3 or $325 each for the 5, $1,625. Under the circumstances

your acceptance came too late. I hope you may be able to make sale of this property now on terms $325 each, $1,625 for the 5 lots.

"Yours resp.,

"C. Rasbach."

To the letter of the 26th Coldwell replied by telegram as follows:—

"Vancouver, B.C., May 31, 1907.

"Chas. Rasbach.

"Stationer, Herkimer, N.Y.

"Do not understand yours of twenty-sixth. See my telegram of the nineteenth, saying sold five lots as per your telegram. Sent the agreement on twenty-first.

"J. A. Coldwell."

I am unable to see anything in this correspondence or the testimony to shew that the defendant ever authorized Coldwell to sell the property, and, in my opinion, the latter was authorized only to communicate offers by prospective purchasers. An unconditional authority to sell at a named price carried with it the power to bind the principal by an open contract of sale, and, as such a contract often subjects the principal to obligations which he would not on consideration be willing to assume, it should not be lightly inferred, but the evidence should shew beyond any reasonable doubt that it was conferred. It is unnecessary to go through the cases in detail, as they will be found concisely reviewed by Buckley, J., in Rosenbaum v. Belson, [1900] 2 Ch. 267.

It may also be noticed that both Jull and Coldwell knew not only that the first offer of $1,000 communicated to Rasbach, but that the figure, $1,250, which he said he would take, were both below the market price.

Coldwell, who was called for Jull, says:—

Q. Mr. Jull said that he thought they were worth about $350 each when he bought them? A. Yes.

Q. You agree that his valuation was correct, that they were worth about $350 each at that time? A. Yes, at that time.

In other words they were worth $1,750. Accordingly, the proper inference is that Coldwell was not an agent for sale, but only an intermediary to communicate offers, as he would have been false to the interests of his principal if he knowingly on his behalf attempted to sell for materially less than

what he knew he could get without his principal's assent, and the rule is that when a transaction may be viewed either in an innocent or tortious light, the former is to be accepted. But, if Coldwell was Jull's agent, as might be argued from the evidence at p. 69, then there was no clear agreement on the part of Rasbach to sell: Harvey v. Facey, [1893] A. C. 552.

The fact that Rasbach settled Coldwell's claim against him for $50 is, of course, irrelevant in this action.

Other points were raised during the argument, but, in the view that I take, it is unnecessary to discuss them. I would allow the appeal, and dismiss the action with costs.

IRVING, J.:—I would allow the appeal. In my opinion, the evidence does not shew a completed contract, nor authority to Coldwell from Rosbach to make a contract of sale. Harvey v. Facey, [1893] A. C. 552, with which compare Johnston v. Rogers, 30 O. R. 150, is in point.

CLEMENT, J., also concurred.

BRITISH COLUMBIA.

JANUARY 17TH, 1908.

FULL COURT.

REAR v. IMPERIAL BANK OF CANADA.

Banks and Banking—Cheque of Customer—Presentment to Clerk in Bank—Direction to Present to another Clerk Interpreted as Refusal to Pay—Action for Damages for Refusal to Cash Cheque—Evidence for Jury—Admission of Presentment—Inference from Conduct—Waiver.

Appeal by plaintiff from judgment of CLEMENT, J., dismissing an action for damages for wrongfully refusing to cash the plaintiff's cheque.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

W. S. Deacon, for plaintiff.

J. Martin, K.C., and Craig, for defendants.

HUNTER, C.J.:—The plaintiff's claim is for damages for wrongfully refusing to cash the plaintiff's cheque. It was admitted that there were sufficient funds, and that the cheque was duly drawn and indorsed, and the sole defence is non-presentment.

The only evidence as to the presentment was that of the manager of the defendants, who, in answer to interrogatories, stated that a clerk from the Bank of Commerce shewed the cheque to one West, a clerk of the defendants in charge of the savings ledger and the A. to K. ledger, and that West told him to present it to the clerk in charge of the L. to Z. ledger; that it was not presented to such clerk, who was the only clerk to whom it could be duly presented. Neither West nor the Bank of Commerce clerk was called, but Mr. Deacon insisted that there was enough to go to the jury when he proved that the cheque was produced to West, and that, in consequence of what transpired, the Bank of Commerce sent a telegram to Seattle, where the payee then was, stating that the plaintiff had no account. But what the Bank of Commerce did was clearly res inter alios, and all that was shewn therefore was that the cheque was presented to a clerk who, according to the only evidence given on the subject, was the wrong clerk.

The contention that without more a direction by one clerk to present the cheque to another clerk might reasonably be found by the jury to amount to a refusal, is, in my opinion, untenable; it would be just as arguable to say that a jury might find that a cheque had been dishonoured which had been presented to the janitor or charwoman. It would be difficult, if not impossible, especially in the case of an incorporated bank, to carry on a banking business in orderly fashion if the bank could not require the customer or payee to present his cheque to a particular clerk.

As therefore the jury could not reasonably have found that the bank had acted unreasonably in requiring the cheque to be presented to a particular clerk, I think the dismissal was right.

MORRISON, J., concurred.

IRVING, J. (dissenting):—In this case the plaintiff argues that the conduct of the defendants in authorizing the Bank of Commerce to telegraph in the afternoon of Saturday to the holders of the cheque that it had been paid, is an admission

by conduct from which the jury might properly infer that the cheque had been indeed presented at their bank. Had the jury so found, I do not think we could have set the verdict aside, on the principles laid down in Metropolitan R. W. Co. v. Jackson, 3 App. Cas. 207; cf. also Leith v. O'Neill, 19 U. C. R. 235.

I therefore think the case should have been allowed to go to the jury.

Bowen, L.J., in Davey v. London and South Western R. W. Co., 12 Q. B. D. 70, at p. 76, said: "It is not because facts are admitted that it is therefore for the Judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the Judge to let the jury decide between such conflicting views."

Now, from the admitted facts in this case could reasonable people draw different inferences?

In the edition of Byles on Bills (issued in 1891) now in the library, I find the following cases cited in support of the proposition that it is not necessary to prove presentment by direct evidence, but the defendant's part payment or promise to pay after the bill or note is due, is prima facie evidence of presentment. Croxon v. Whitehall Worthen, 5 M. & W. 5, an action brought by the indorsee against the maker; defence (inter alia) that the note had not been duly presented. At the trial the plaintiff gave no direct evidence of its presentment, but two letters were put in, in which he asked for indulgence, and stated that he had been drawn into making the note by Hill, the indorser. The plaintiff also gave in evidence a promise by the defendant to pay the note by instalments. Defendant moved for a nonsuit. Abinger, C.B., says: "The defendant is the party to pay the note which he has made payable at a particular place; as against him, therefore, it appears to me, his subsequent promise admits all that was necessary to entitle plaintiff to recover." Parke, B., was of the same opinion. Alderson, B.: "The defendant is supposed to know the law; he knows, therefore, that he is not liable unless the note has been duly presented. With that knowledge he undertakes to pay it. Is not that evidence for the jury that he knows it has been presented?"

This case followed Lundie v. Robertson, 7 East 238, an action on a bill. The defendant, when applied to for payment,

said he had no cash by him then, but, if the witness would call again and bring the account with him, he (defendant) would pay it. Lord Ellenborough, after making the statement of fact, as above, continued: "Now, when a man against whom there is a demand promises to pay it, for the necessary facilitating of business in transactions between man and man, everything must be presumed against him. It was, therefore, to be presumed prima facie from the promise so made that the bill had been presented for payment in due time and dishonoured, and that due notice had been given of it to the defendant. But, taking the subsequent conversation as connected with the former, the only limitation of it would be that the defendant stated that he had not had regular notice of the dishonour; but even that objection was waived in the same breath; for the defendant said that as the debt was justly due he would pay it. Then it stands on the first conversation, as an absolute promise to pay the bill; thereby admitting (for I do not put it on the ground of waiver of any objection to the non-presentation of the bill in due form as existing in fact) that there did not exist any objection to his payment of the bill; but that everything had been rightly done. That supersedes the necessity of the ordinary proof."

In Greenway v. Hindley, 4 Camp. 52, Lord Ellenborough "considered that the defendant's acknowledgment was a sufficient foundation from which the jury might infer the facts stated in the declaration."

Campbell v. Webster, 2 M. G. & S. 258, an action against the maker of a bill by the payee. Plea that the bill had not been duly protested. At the trial some difficulty arose as to the proving of the protest; thereupon certain letters written by defendant were put in and relied on, either as a waiver of a protest or as evidence that a protest had been duly made. Erle, J., told the jury that the letters were evidence whence they were at liberty to infer that the bill had been protested. The jury found for plaintiff. On the return of a rule for a new trial Tindal, C.J., said: "And the question is, whether the evidence given at the trial on the part of the plaintiff was properly received, the jury correctly directed upon it, and the conclusion they came to right. The rule seems to me to be properly laid down in the case of Patterson v. Becher, 6 J. B. Moore 319, which goes to the very foundation of the objection here. The way in which Richardson, J., there states the law upon the subject, appears to me to be perfectly correct. 'It has been decided,' he says, 'in Rogers v. Stevens, that a pro-

mise to pay, after a bill or note becomes due, will dispense with proof of notice of dishonour. So, it will dispense with the proof of protest, as it will amount to an admission, on the part of the defendant, that the plaintiff had the right to resort to him upon the bill.' That is, if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest, or of want of notice, it is a question for the jury whether he does not thereby admit that all the steps that are essential to create liability in him, have been duly taken." Coltman, J., p. 267: "An admission of liability is enough to warrant the jury in inferring that all the steps necessary to create such liability have been duly taken." Maule and Erle, JJ., delivered opinions to the same effect.

In Cordery v. Colville, 14 C. B. N. S. 374, the bill was payable at the defendant's house. On its becoming due, the plaintiff took it there and shewed it to the defendant's wife. Subsequently the plaintiff promised to pay it. This was held by Erle, C.J., and Byles, J., evidence from which the jury might, if they thought proper, infer that the defendant had notice.

These two last mentioned cases are cited in Taylor on Evidence as admissions by conduct, par. 805, p. 521 (1897 ed.), and it is observed that in all cases the admissions are made between the parties to the note or bill (as the case may be), and the question of waiver is more or less mixed up with the bald question of fact. In the present case the plaintiff is trying to sheet home to his banker the fact that the cheque in question was duly presented, and there is no question of waiver involved.

The cases cited are not exactly on all fours with the present case, but the reasoning, I think, is applicable.

BRITISH COLUMBIA.

JANUARY 17TH. 1908.

FULL COURT.

CASTLEMAN v. WAGHORN.

Campany — Shares—Sale — Duty of Vendor — Transfer — Necessity to Procure Registration—Failure of Consideration—Articles of Company.

Appeal by plaintiff from judgment of MORRISON, J., dismissing the action, which was brought for the return of money

paid by plaintiff for shares, on the ground of failure of consideration and on another ground.

The appeal was heard by HUNTER, C.J., IRVING, J., CLEMENT, J.

Stuart Livingstone, for plaintiff.

J. A. Russell, for defendants.

HUNTER, C.J.:—On the argument I understood Mr. Livingstone to admit that he had to contend that it was the duty of the vendor to procure registration of the shares, and that he could not maintain that the certificates were not duly transferred by the transferor through the medium of his wife as amanuensis.

The proposition contended for cannot be supported on the cases, which shew that under the ordinary contract the vendor's duty is at an end when he transfers in due and proper form, and does nothing to interfere with the registration of the transfer: Stray v. Russell, 28 L. J. Q. B. 279; London Founders v. Clarke, 20 Q. B. D. 576; Hooper v. Herts, [1906] 2 Ch. 549.

Here there is the additional feature that the buyer had the opportunity of inspection before paying the draft.

I would dismiss the appeal.

CLEMENT, J.:—This case may be disposed of on one very short ground. Counsel for the appellant conceded that his case must fail if he cannot establish this proposition, that on the sale of shares in an ordinary limited company it is the duty of the vendor, upon request, to procure the registration of the transfer upon the company's books, and that failure to perform this duty entitles the vendee to treat the contract as at an end and to sue for the return of the purchase price. I think this proposition cannot be supported. Wilkinson v. Lloyd, 14 L. J. Q. B. 165, which was cited in support of it, turned upon a special clause in the company's regulations, which, as put by Fry, L.J., in London Founders v. Clarke, 57 L. J. Q. B. 291, at p. 294, "made the consent of the directors a condition precedent to the transfer." This last case, following Stray v. Russell, 28 L. J. Q. B. 279, 29 L. J. Q. B. 115, seems to me to settle the law in a sense contrary to that contended for by the plaintiff. See also Skinner v. London Marine, 54 L. J. Q. B. 437, at p. 439; and Hooper v. Herts,

75 L. J. Ch. 253. It was urged that Stray v. Russell and the cases following it depended upon the usages of the London Stock Exchange, but those usages were put forward merely to shew that it was a term of the bargain that the purchase price should be paid before the time for registration had arrived. That was clearly a term of the bargain here; the share-certificates and transfers were attached (c.o.d.) to the draft for the purchase price. The plaintiff did not deem it incumbent on him to shew that the transfer was ineffectual otherwise than for want of registration; the evidence points the other way.

The appeal should be dismissed with costs.

IRVING, J. (dissenting):—The plaintiff sues for the return of his money, on the ground of failure of consideration, and also on the ground that the defendants shared with his, plaintiff's, agent a secret commission. The second ground fails, as there is no evidence to support this charge.

On the first ground: plaintiff, who was in Ottawa, had presented to him there a demand draft for $1,190, drawn by the defendants and one F. G. Ames. Attached to the draft were two share certificates, one for 3,000 shares issued to James Boecher and the transfer signed by James Boecher; the other for 400 shares; concerning these 400 shares no trouble has arisen.

As to the 3,000 shares—these had been bought through Ames for the plaintiff at 32½c., and when the draft was cashed the defendants received in respect thereof the sum of $975.

By the articles of the company, to which document, governing as it does the transfer of shares, we must look for the terms to be implied in a contract of sale of shares—the instrument of transfer of share shall be signed by the transferor, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in respect thereof: art. 25 (cf. 15 table A.) By art. 24, every transfer must be in writing and in the usual common form, and must be left at the office, accompanied by the certificate of the shares to be transferred—and such other evidence (if any) as the directors may require to prove the title of the intending transferor.

It is the duty of the transferee to obtain recognition of himself as shareholder, but, in my opinion, the plaintiff, by annexing to the draft the certificate indorsed with the name

of James Boecher, represented that the signature thereon was that of James Boecher himself. The ordinary contract by the seller on the bargain and sale of registered shares of a company is that the seller shall execute a valid transfer of the shares and hand it to the transferee.

If the transferee is not furnished with a valid transfer, then the defendants have not performed what they agreed to perform.

It is said that there is no duty on the vendor to procure registration. I agree, but my point is that the vendor must hand to the purchaser something that he (the purchaser) can get registered. For example, to take an extreme case, handing a forged signature to a transfer or an unsigned transfer would not be compliance by the vendor with his contract.

In this case the signature to the transfer was not in the proper handwriting of James Boecher. The evidence at the trial is all one way. His wife says she wrote it, at his request, just before he died (that is in.....) and that her son at her request, after her husband's death, sold the shares to the defendants. The will of her late husband has not been proved.

Having regard to the 24th and 25th articles, which require the signature of the transferor to appear on the transfer, can it be said that the defendants have given the plaintiff a valid transfer of the shares?

At common law if A. authorizes B. to sign for him, the signature so made is A.'s signature, but there are cases in which a statute may require personal signature, e.g., Hyde v. Thomson, 2 Bing. N. C. 776; Toms v. Cuming, 7 M. & G. 88; Miles v. Bough, 3 Q. B. 845.

In my opinion, the words "signed by the transferor" in art. 24, standing by themselves, mean personal signature. A comparison of the signature in the company's books with the separate signature as transferor, is obviously the most convenient and usual safeguard the officers of the company have in making a transfer; other precautions are also taken: see 5 Q. B. D. 194-5, as to duty of company. The company have seen fit to prescribe certain regulations for their own protection, and shareholders must abide by these.

The plaintiff, having paid the draft drawn on him by the defendants, applied to the company for registration of the transfer, and was refused. He then brought this action. I think he is entitled to recover $975 on the ground of failure of consideration.

BRITISH COLUMBIA.

JANUARY 22ND, 1908.

FULL COURT.

MYERS v. TYTLER.

Contract—Sale of Mining Claims — Condition—Non-fulfilment—Failure of Action for Price.

Appeal by plaintiff from judgment of HUNTER, C.J., dismissing the action, which was brought to recover the price of certain mining claims under an agreement for sale thereof by plaintiff to defendant.

The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

W. S. Deacon, for plaintiff.

Craig, for defendant.

IRVING, J.:—The facts were not very well understood at the time the statement of claim was drafted, and therefore it will be well to state that this appeal in no way depends upon the contract of June, 1906, but is confined wholly to the 9 claims located by plaintiff, which he, subsequent to such location, agreed to turn over to defendant, on the same terms as those contained in the memorandum of 20th June. The condition was that plaintiff should shew the claims to defendant, and if defendant approved of them, then he (defendant) should buy them at so much per acre. This agreement involved combined action on the part of the two parties thereto. There was an obligation on defendant to appoint a time, and there was an obligation on the part of plaintiff to go with him. The agreement called for bona fides on both sides.

Having regard to the evidence, in particular at pp. 11, 15, and 30, I have reached the conclusion that defendant did on several occasions endeavour to arrange with plaintiff for a visit to the claims, and I agree with the Chief Justice that it is not apparent that the plaintiff was ever ready or willing, within the meaning of the agreement, to shew the claims for examination.

It is not necessary to deal with the other points.

I would dismiss the appeal.

MARTIN, J.:—After a consideration of the cases cited by Mr. Deacon, I have come to the conclusion that we should not be justified in reversing the judgment of the trial Judge on the facts, and therefore the appeal must be dismissed.

CLEMENT, J.:—I agree with my brother Irving that the finding of fact by the Chief Justice is well warranted by the evidence, and disposes of the case.

BRITISH COLUMBIA.

JANUARY 29TH, 1908.

COURT OF INVESTIGATION.

THE "TARTAR" v. THE "CHARMER."

Ship—Collision—Investigation under Canada Shipping Act—Rules of Navigation—Signals—Findings as to Fault—Consequences.

Investigation under the Canada Shipping Act into the collision between the steamships "Tartar" and "Charmer" off the Sandheads, Gulf of Georgia.

The master of the "Tartar," in person.

E. V. Bodwell, K.C., for the "Charmer."

The judgment of the Court (MARTIN, Loc.J. in Admiralty, and James Douglas Warren and David Llewellyn Jones, master mariners), was delivered by

MARTIN, LOC.J.:—In view of the conclusions arrived at, it will not be necessary to follow in detail the voluminous evidence of the opposing parties; it will suffice to consider their conduct on their own statements.

The "Tartar" is a single screw steamship, length 376 feet, gross tonnage 4,425, speed 11 knots.

The "Charmer" is a single screw steamship, length 200 feet, gross tonnage 1,044, speed 11½ knots.

First, then, as to the "Tartar." Assuming the statement of her pilot (H. R. Jones) and officers (particularly third officer Winter) to be correct, she left Vancouver for Victoria en route for China, with about 152 passengers, on 17th October, 1907, at 4.10 p.m., weather fine, light airs; cleared the Narrows at 4.40, just a mile off Point Grey at 5.06, and at 5.25 course set down the gulf, S 20E, and proceeded thereon a distance of 5½ miles to the point of collision. From a considerable distance, over 5 miles, the pilot had seen a fog bank ahead, and as he approached it, about a mile and a half off, at 5.45, he heard ahead of him an indistinct whistle, the position of which neither he nor the third officer could determine. "It seemed to be ricochetting off the ragged edge of a fog," as he put it. At 5.50 he sounded his own fog whistle, and repeated it at 5.51, and 5.52, when the signal to "stand by the engines" was given, the "Tartar" being, as Winter says, "then in somewhat of a mist, previous to entering the fog;" and as she entered it (as Chief Officer Davis says), her engines then giving her a speed of 11 knots, were put to slow. Just upon entering the fog there was "heard one short blast nearly ahead," as Winter gives it in his note book, and "we immediately answered one short blast" and ported the helm one point. At 5.54 the "Tartar" heard two short blasts on her port bow, upon which she stopped her engines, ported a little more, according to the pilot, and answered with one short blast. Then, almost immediately, she heard two short blasts from the other ship on the port bow, which were answered by one short blast, and then almost simultaneously, and at 5.55, the "Charmer" was sighted on the port bow, whereupon the engines were put full speed astern and the helm hard aport, but too late to prevent the "Charmer" from crashing into the "Tartar's" port bow. There are, as might be expected, some slight discrepancies in the different accounts given by those on the "Tartar's" bridge, but, substantially, that is her case. The only additional fact that need be mentioned is that Pilot Jones had, as the signals came closer, satisfied himself that the approaching vessel was the "Charmer," which helped to satisfy him that she must be inside of his course, for, as he explains, "as it always happens the local boats are always inside our course, we always meet them on the port side."

The foregoing situation is primarily covered by art. 16, as follows: "Every vessel shall, in a fog, mist, falling snow,

or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Now, taking the facts to be as stated, it is clear that, whatever may be said as to the duty of the "Tartar" before she entered the fog (and it should be noted that according to the decision of the Court of Admiralty in The "Bernard Hall" (1902), 9 Asp. 300, she was, in the circumstances, before she actually entered it, already within the scope of art. 16), there can be no doubt that, as she was doing so, and after she had done so, her duty was to have stopped the engines upon hearing the signal of another vessel, fine on her port bow, i.e., nearly ahead of her, "the position of which was not ascertained." There was nothing in the circumstances which did not admit of that precaution being taken, and the uncertainty of sounds in a fog has been repeatedly remarked upon in these collision cases, and, as the Lord Chancellor recently said in The "Naworth Castle" v. The "Vaderland," Smith's Leading Cases on Collision Regulations (1907) 152, and in the House of Lords on 25th November, 1907, The Times, 27th November (1907), "sounds in a fog are notoriously unreliable." See also the report of the Trinity House fog signal committee in 1901 in Smith, supra, p. 296. In the last mentioned case the Lord Chancellor also said: "The object of the rule is not to keep two ships permanently stationary in a fog, but to require them to stop and then to move only with great caution."

According to the intent of said article, the pilot of the "Tartar" was not justified, in the circumstances, in going ahead, relying on the accuracy of his location of the "Charmer" by means of said signals, nor upon his assumption as to the course usually pursued by her. Had he stopped after he entered the fog upon hearing the whistle ahead of him and ascertained the "Charmer's" real position, before moving ahead, the collision would, in all probability, have been averted. As was recently said in The "Avas" (1906), 76 L. J. Ad. 37: "It is so absolutely well known that one cannot rely upon the direction of whistles in a fog, that no man is justified in relying with certainty upon what he hears when the whistle is fine on the bows, like this was

undoubtedly, or is justified in thinking it is broadening unless he can make sure of it. That is the view I entertain very strongly, because, as it is well established that the direction is an uncertainty, it is of no use trying to rely upon it as a certainty by saying you looked at the compass."

And see to the same effect The "Resolution" (1889), 6 Asp. 363; The "Cathay" (1899), 9 Asp. 35; and The "Ebor" (1886), 11 P. D. 25, wherein, at p. 27, the matter is considered in its various aspects by the Court of Appeal.

Then as to the "Charmer." Her master admits that on her customary run from Victoria to Vancouver from the time he left Active Pass, Gossip reef, at 4.34 p.m., on a course N.W. by N.¼N., to clear the Sandheads, she ran full speed, 11½ knots, through the dense fog, till 5.44, when she heard the bell of the Sandheads lightship, which was abeam, wherupon he altered the course to N. by W.½ W., and continued at full speed till 5.54, when he heard the fog signal of another vessel, close to, bearing about a point and a half to two points on the starboard bow, whereupon he starboarded his helm one point, blew two blasts, and slowed down the engines, and kept on that course for 9 minutes without getting another signal, and blowing his own fog signals every 10 seconds, till he sighted the other vessel, at 5.58, broad on his starboard bow, whereupon he reversed his engines full speed astern, but too late to avoid the collision; he had only heard a second blast from that steamer just as she was coming out of the fog.

On these facts we simply have to repeat what has been said with respect to the conduct of the pilot of the "Tartar," viz., that the "Charmer" should have been stopped on not hearing a second whistle from the other vessel known to be close at hand. We also add that art. 16 was further violated by running through the fog at full speed, in regard to which we content ourselves by citing the following recent observations from the Admiralty Court in the case of The Empress (1906), Smith's Leading Cases on Collisions, supra, 91-2, wherein it was said: "It does not require more than a statement of the defendants' case to shew what a hopeless case theirs was, and why they were obliged to admit that their navigation was negligent. Here you have a steamer of high power, whose full speed, I am told, is 18 knots, and which had on board at this time a crew of 46 hands all told, and 100 passengers. On her own case she was steaming at 10 knots in a very dense fog. That

is positively shocking to my mind, and I think it is a gross breach of art. 16, which requires vessels to proceed at a moderate speed in a fog. In a locality such as this round the Isle of Man, where plenty of traffic is to be expected, and with a whole lot of people on board, it seems to me terrible that so little care should be taken with regard to speed—that a vessel should go at that speed."

And in The "Nereus" (1907), Smith's Leading Cases, supra, 159, it was held that "on the evidence of the master of the 'Oravia,' that vessel was going 10 knots at least—it may have been a little more—in a fog which was so thick that he could not see more than 300 or 400 yards, and the case of the 'Oravia' is hopeless for that reason."

And the Lord Chancellor ends his judgment in the "Naworth Castle" case, supra, by saying: "No qualification ought, however, to be allowed in the strictness of the rule requiring caution in a fog."

Further, with respect to the fog signals blown by the "Charmer," we are not satisfied that the prolonged blasts were of the duration required by the regulations, viz., from 4 to 6 seconds.

The necessity of carefully conforming to the regulations in this respect is obvious, though we are aware that a laxity of usage exists, which makes it desirable to draw attention to the matter.

With respect to the helm signals given by the "Charmer," presumably under art. 28, when in the fog and out of sight of the "Tartar," and responded to by the "Tartar," we think it proper to remark that there does not appear to be any warrant for so doing, because those signals are only authorized "when vessels are in sight of one another." This is pointed out in Marsden on Collisions (1904), pp. 462-3, and in Roscoe's Admiralty Practice (1903), p. 244. In giving unauthorized signals under 28, there is a danger of confusing them with those that are elsewhere authorized, e.g., under art. 15, particularly if they are not given with accuracy.

Our decision is that both vessels were in fault, and contributed to the collission, but the "Charmer" was more to blame than the "Tartar," having infringed art. 15, as well as 16.

With respect to the consequences of the failure of certain officers to perform their duty, we are of the opinion that the case is not one that requires the cancellation or suspen-

sion of certificates, for the following reasons: (1) no injury to life or limb resulted, nor any damage, other than to the owner; (2) the vessels being owned by the same company, there are no conflicting interests: (3) the good seamanship displayed after the collision; and (4) we recognize that it has been heretofore more or less generally understood that masters are expected to try and make connections without at all times having due regard to the state of the weather. But, in the future, all concerned should take notice that this last element will not be considered in extenuation, for the time has come, consequent upon the great amount of shipping in these waters, when, for the protection of the public, the regulations must be strictly observed.

Bearing in mind the foregoing extenuating circumstances, the judgment we think proper to pronounce is:—

(1) That William Henry Whitely, master of the "Charmer," should be and he is hereby severely censured.

(2) That Harry Robson Jones, pilot of the "Tartar" be, and he is hereby censured.

(3) That Archibald Hentley Reed, master of the "Tartar," be and he is hereby exonerated from all blame, and is commended for the prompt assistance given to the "Charmer" after the collision.

BRITISH COLUMBIA.

HUNTER, C.J. JANUARY 29TH, 1908.

TRIAL.

ANGLO-AMERICAN LUMBER CO. v. McLELLAN.

Company—Shares—Sale of—Delivery—Promissory Note for Price—Action on—Allotment of Shares.

Action upon a promissory note.

J. A. Russell, for plaintiffs.

C. W. Craig, for defendant.

HUNTER, C.J.:—This is an action on a promissory note for $5,000 dated 17th May, 1907, made by the defendant to the order of the plaintiffs, payable 10 days after date, at

their office, Vancouver. The defendant says that he notified the president of the company before its due date that it would not be paid.

It is common ground that the note was signed and given in payment for 50 shares of stock in the company, and an application for said shares was signed by the defendant contemporaneously with the giving of the note.

It is also not in dispute that the note was placed in the company's bank with 50 shares deposited in escrow, and to be delivered on payment of the note to the defendant; nor was there any notice of allotment.

The plaintiffs allege that the defendant, after inspection of a balance sheet and making inquiries, purchased the shares as an investment, and that there was also an arrangement whereby the defendant was to enter the employ of the company as yard foreman at $100 per month. The defendant alleges that his application to take the shares was contingent on his remaining in the employment, and that if he found he was not equal to the work he could give it up, and that the president, with whom the negotiations all took place, would take the shares over from him and refund the moneys. There does not appear to have been any formal allotment of the shares by the directors, but, according to the evidence, the president was empowered by a resolution to dispose of the shares, and I see no reason to suppose that the shares were not validly issued, nor in fact is any such defence raised in the pleadings. There was, however, the defence raised in the pleadings that the defendant was induced to give the note by the misrepresentations of the president of the company, but this defence has not been substantiated.

Now, had there been nothing more in the case than the receipt of the note on the one hand, and on the other hand delivery to the defendant of the shares or a notice of allotment, I apprehend there would be no doubt that so far as concerned the company the defendant would not have been in a position to recede, and would have been liable on the note, and if he had any action at all it would have been against the president. In other words, the sale would have been complete, as the application, so called, would in reality have been merely the formal acceptance of an offer by the company, through the president, to sell the shares, and no notice of allotment would have been necessary.

But it may be said that the company saw fit to attach conditions which it is not shewn were assented to by the defendant. The note was payable at their office, and the defendant was told the shares would be allotted immediately. But the note was put in the bank, with the shares, which were to be delivered to the defendant only on payment, without the knowledge or assent of the defendant. How then is it open to the company to say that the defendant, who had got nothing for his promise to pay, cannot withdraw from the transaction, he having neither received the shares nor any notice of allotment? Suppose the defendant had become bankrupt before the maturity of the note, and that the company had not yet delivered the shares, or sent notice of allotment, would not the company have claimed a right to return the note and to decline to complete the transaction? Then, if the company could have withdrawn, why should not the defendant be in the same position? Why should not the act of the company in putting the note in the bank and the shares in escrow preclude them from alleging that the sale became complete and irrevocable on delivery of the note?

I think the answer to all this is that it is not an uncommon occurrence for both parties to a transaction to be under an erroneous opinion as to their legal position, and to believe that they are in one relation to each other, while in point of law they are in quite a different relation.

Here, I think that upon the signing of the application, so-called, and the delivery of the note, the defendant became eo instanti the owner of the 50 shares, and that no notice of allotment was necessary, as the president had full power to sell the shares, and the numbers of the certificates would of course be immaterial. What the defendant bought and at that moment acquired was 50 invisible choses in action called shares in this company. He could, I apprehend, have forthwith validly assigned them to any one else, or, if the articles of association required a valid assignment to be made by indorsing the certificates, have at any rate immediately validly bound himself to effectually transfer them when the certificates issued; in other words, he had the complete jus disponendi the moment he delivered the note, and could at any time have forced the company to deliver the certificates, and the latter's only remedy would have been recovery on the note. How then can it make any difference that the president of the company, with or

without the authority of the company, but without the assent of the defendant, undertook to deal with the certificates by putting them in escrow?

If the defendant was damnified by the act of the president in so dealing with the defendant's property, his claim would be against the president, or the company, as the case might be; but how can such action, even if assented to or authorized by the company, be a good ground for the defendant refusing to pay the note, when the shares had in law become his property?

I think there should be judgment for the plaintiffs with costs, but whether or not it should be on condition of the delivery of the certificates is a matter on which I prefer to hear counsel before coming to a decision.

BRITISH COLUMBIA.

LAMPMAN, Co.C.J. JANUARY 31ST, 1908.

COUNTY COURT OF VICTORIA.

GRAND LODGE OF KNIGHTS OF PYTHIAS v. GREAT NORTHERN R. W. CO.

Railway—Contract for Special Passenger Rates for Delegates to Convention—Breach—Validity of Contract—Standard Passenger Tariff not Filed and Approved—Railway Act—Construction—Recovery of Amount Overpaid.

Action to recover $126.70, paid by plaintiffs for railway fares in addition to the amount properly payable under a contract with defendants, as alleged.

R. T. Elliott, K.C., and Morphy, for plaintiffs.

R. L. Reid, K.C., for defendants.

LAMPMAN, Co.C.J.:—In May last the Grand Lodge of the Knights of Pythias held a convention in Nelson, and with a view to arranging for transportation of those delegates who would attend from Victoria, Mr. Pferdner, the secretary, saw Mr. Stephen, the Great Northern agent at Victoria, and he communicated with the assistant general

passenger agent in Seattle. The result was that the defendants agreed, if the attendance at the convention was 100 or more, to give a rate of one first class fare for the round trip.

It was arranged that the full fare should be paid in Victoria, and a receipt issued according to a standard form supplied by the company; the delegate kept the receipt, and on the back of it there was a blank certificate shewing his attendance at the convention, and on his producing the receipt to the Nelson agent and the certificate signed by Mr. Pferdner, he was to get a ticket for Victoria without payment. There was no dispute about the fact that over 100 attended, or that the Victoria delegates complied with all the requirements of the agreement, but the Nelson agent refused to issue the return tickets, and from each of the 7 delegates who went over the Great Northern he collected $18.10, or $126.70 in all, and this amount the Grand Lodge refunded to the delegates, as it pays the fares of delegates attending the convention.

Mr. Reid, for the defendant company, said that the reason they did not carry out their contract was because to have done so would have exposed them to a penalty of $1,000, under sec. 398 of the Railway Act, inasmuch as the company's standard passenger tariff had not been filed with the Board of Railway Commissioners and approved by it.

Section 331 of the Railway Act provides that "a standard passenger tariff shall be filed, approved, and published in the same manner as required by this Act in the case of a standard freight tariff. 2. Until the company files its standard passenger tariff and such tariff is so approved and published in the Canada Gazette, no tolls shall be charged by the company."

Based on this section Mr. Reid contended that the contract was illegal, and hence the plaintiffs cannot maintain their action, and he cited several cases in support of his contention.

I should be very sorry if I should have to give effect to this contention and let the defendant company escape from the swindle perpetrated on the plaintiffs. If the defendants had been possessed of any inclination to act fairly with the plaintiffs, they would have found a way out of their difficulty, but from the facts disclosed before me I am not satisfied that it was fear of incurring a penalty that prompted them to break their agreement. They had

agreed to charge in effect nothing for the return trip: they charged $18.10, a rate admittedly not approved by the Board, so how they escaped the liability to a fine I fail to see. On their own shewing they were liable to a fine if they charged nothing or if they charged $18.10; the whole result seems to me to be that if they carried out their agreement they lost $18.10 per passenger, and if they refused to carry out their agreement they would gain $18.10 per passenger. It looks to me as if they broke their agreement because they thought it would pay better to break it. I am glad to see that the defendants' general agent at Victoria was averse to the course adopted, as appears from his letter of 6th May to the assistant traffic manager in Seattle.

It appears that the standard passenger tariff was not filed and approved as required by sec. 331, but Mr. Elliott refers to sec. 341 of the Act, and contends that the contract sued on was permitted by sub-sec. (b) of that section, which is as follows: "341. Nothing in this Act shall be construed to prevent,—(b) The issuing of mileage, excursion or commutation passenger tickets, or the carriage at reduced rates of immigrants or settlers and their goods or effects, or any member of any organized association of commercial travellers with his baggage."

The transaction here was a contract to give an excursion rate, and would include an implied term to issue an excursion ticket or something equivalent to it, and hence the transaction is within the provisions of sub-sec. (b), and, according to the first words of the section, there is nothing in the Act to prevent it. True, sec. 331 says that until the standard passenger tariff is approved and published no tolls shall be charged, but I do not think that the provisions of sec. 341 become effective only after the requirements of sec. 331 have been complied with, and I am fortified in this view by what Meredith, C.J., says in delivering the judgment of the Divisional Court in Ontario in Lees v. Ottawa and New York R. W. Co., 31 O. R. 567. The old Railway Act, 51 Vict. ch. 29, sec. 227, enacted that "no tolls shall be levied or taken until the by-law fixing such tolls has been approved of," etc. The plaintiff had frequently travelled by the railway, and, as the tolls had not been approved, he brought an action to recover the sums he had paid. It was held that he could not recover, and the Chief Justice said (although the Act at that time had no provision similar to the present sec. 341), at p. 571: "It

is plain, I think, that the theory upon which the action to recover back the moneys paid by the respondent was brought cannot be supported. To give effect to it would be to hold that a company whose tariff has not been sanctioned by the Governor-General must not carry on its business, and is not at liberty even to make special contracts with persons who may be desirous of using the railway for the purpose of travel or for the carriage of goods, for the service which is desired, and that if it does so, though the service is performed and the charge made for it, which has been paid, is a reasonable one, the person who has got the benefit of it may recover back what he has paid, and for such a proposition I can find no warrant in the provisions of the Act."

The result is that the defendants must pay the plaintiffs $126.70 and interest thereon at the rate of 5 per cent. per annum from 15th July last, and the costs of the action.

ALBERTA.

STUART, J. JANUARY 7TH, 1908.

TRIAL.

HILL v. BARWIS.

Costs—Damages—Action for Specific Performance of Contract for Sale of Land—Sale by Defendant to Another—Contract by Plaintiff to Sell to Another—Costs Recoverable as Damages—Quantum of Costs—Fulfilment of Contract after Action Brought.

Action for specific performance of an agreement for the sale of land in the city of Calgary.

A. E. Millican, for plaintiff.

C. B. Reilly, for defendant Barwis.

P. Bergeron, for Marwood and Dobson.

STUART, J.:—This was an action for specific performance of an agreement to sell lots in the city of Calgary. The defendant Barwis, who was the vendor, entered an appearance, but made default in delivering her defence. The plain-

tiff then applied by way of notice of motion for leave to enter a judgment directing the agreement to be specifically performed by conveyance, and asked that damages be assessed. On the return of the motion counsel for the defendant Barwis appeared and admitted the agreement and that there was practically no defence. It appeared that, subsequent to the agreement by Barwis to sell to the plaintiff, Barwis had, by carelessness or forgetfulness, entered into an agreement to sell the same lots to the defendant de Bernie, and had in fact completed the agreement by conveyance. Subsequently to this again, the plaintiff, relying on the contract of the defendant Barwis, and without making any search as to title, which would have revealed the fact that Barwis had sold and conveyed to de Bernie, entered into an agreement to sell the lots to the firm of Marwood and Dobson, which firm had actually taken possession, and erected or commenced to erect a couple of houses on the lots. Marwood and Dobson, not being able to secure title from the present plaintiff, began an action of specific performance against her, which she defended, apparently to gain time, and that action stood for trial at the December sittings at Calgary. In the meantime, however, an arrangement had been made with de Bernie by which the latter, for a consideration, reconveyed the lots to some one—it was not stated to whom exactly—who would give title to Marwood and Dobson. This apparently enabled the defendant Barwis to fulfil her contract with the plaintiff, and the only question was as to costs and damages. The plaintiff contends that she should not only get her party and party costs of the action, but should also get costs as between solicitor and client, and also her costs incurred in the defence of the action brought by Marwood and Dobson against her, as well as any costs she may be liable for to that firm in consequection with that suit. It was admitted by the plaintiff that these extra costs were the only damages suffered by her through the delay.

It appears to me that the plaintiff's contention is correct, with certain limitations. For instance, if the facts had been that the defendant Barwis, instead of deliberately or carelessly parting with her title after the agreement had been made, had merely been unable to convey through some latent pre-existing defect in her own title, of which she was not aware, the plaintiff could not have recovered any damages, for two reasons. In the first place, ever since the case of

Flureau v. Thornhill, 2 W. Bl. 1078, it has been the rule that upon a contract for the sale and purchase of a real estate, if the vendor without fraud is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain: Bain v. Fothergill, L. R. 7 H. L. 158. In the second place, the plaintiff acted with quite too much haste in agreeing to resell before assuring herself that her vendor could make a good title to her. In Walker v. Moore, 10 C. B. 416, Bayley, J., said: "The plaintiff must shew that the damages which he seeks to recover arose from the act of the defendants and not from his own acts. . . . But if premises for which a party has contracted are by him offered for resale too soon, that is at his own peril, and the damage, if any, resulting from such offer, arises from his own premature act, and not from the fault of his vendor." And Littledale, J., said: "Nor am I prepared to say that if such examination (i.e., of the title) had been made, the plaintiff could have recovered; for it seems to me to be contrary to the policy of the law that a man should offer an estate for sale before he has obtained possession and a conveyance."

The principle laid down in these two latter quotations would, I think, have been an additional reason for depriving the plaintiff in this case of any right to damages if the circumstances had been as I have suggested. But the case of Bain v. Fothergill, to which I have referred, which is a decision of the House of Lords, and which contains an exhaustive review of all the previous authorities on the question, shews quite clearly that where there has been fraud on the part of the vendor, then, although damages may not be recoverable as for a breach of contract, the vendor can be made liable in an action for deceit. In that case Lord Chelmsford, at p. 206, after quoting a passage from Sedgewick on Damages, 4th ed., p. 234, goes on to say: "I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts bona fide, and where his conduct is tainted with fraud or bad faith, is not to be justified or explained on principle." And again at p. 207 he says: "If a person enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."

The present case, however, is distinguishable. There was no fraud or bad faith at the time the agreement was made. At that time the defendant was, as far as appears, in a position to give a good title. But subsequently she, either deliberately or carelessly, put it out of her power to carry out her bargain. That is clearly not a case of fraud or deceit, but a simple breach of her contract to convey, for which she should be held liable for damages. It may be that the plaintiff herself acted hastily in agreeing to sell to Marwood and Dobson without taking the precaution of a simple search in the registry, which would have revealed the fact that the title had passed to de Bernie, and I do not say that there might not be circumstances which would make such hasty action fatal to any claim to damages, but in this case I think the plaintiff was entitled to expect that the defendant would not, at any rate after agreeing to convey, do any act which would put it out of her power to do so, and the plaintiff was entitled, I think, to act in reliance upon that expectation.

I think, therefore, the plaintiff should get judgment not only for her costs of the action, but also by way of damages for such costs or payments as she may have necessarily incurred owing to the action brought against her by Marwood and Dobson. As the balance of the purchase money has been paid into Court by the plaintiff, there will be judgment for specific performance, with a reference as to title, if necessary, and a reference to the clerk to tax costs and ascertain the damages on the following basis:—The plaintiff's costs of the action will be taxed as between solicitor and client, and also the costs of the plaintiff in the action in which she was defendant will be ascertained by the clerk, but only as between party and party. The clerk will also ascertain the amount of costs of the plaintiffs Marwood and Dobson in the other action for which the present plaintiff has become liable, and these 3 sums will be added together, and judgment entered for the plaintiff against the defendant Barwis for the total amount.

As Mr. Bergeron appeared on the application representing Marwood and Dobson, I think I am at liberty to say that the costs on the two latter items should cease at the time de Bernie executed the retransfer, not only as between the present parties, but also as between Marwod and Dobson and the present plaintiff. Any subsequent costs of the other action were surely unnecessary.

ALBERTA.

JANUARY 18TH, 1908.

FULL COURT.

BEERE v. NORTHERN BANK.

Fraud and Misrepresentation—Transfer of Land as Security for Money Lent—Action to Cancel Registration of Transfer—Contract—Condition—Proof of—Breach—Vacating Registration—Terms—Costs.

Appeal by plaintiff from judgment of HARVEY, J., 6 W. L. R. 642, dismissing the action. The appeal was against the defendant Malone only.

The appeal was heard by SIFTON, C.J., SCOTT, STUART, and BECK, JJ.

E. P. McNeill, Macleod, for plaintiff.

J. W. McDonald, Macleod, for defendant Malone.

SCOTT, J.:—The material facts are that one McLeod, acting as solicitor for the plaintiff, applied to defendant Malone, who was then the manager of the Northern Bank at Macleod, for an advance to enable plaintiff to effect a settlement of a certain criminal or quasi-criminal proceeding then pending against him at Claresholm. Malone then agreed to make advances for that purpose to the amount of about $150, and to honour McLeod's cheques therefor, provided the latter would procure from plaintiff a transfer of the property described in the statement of claim. Plaintiff and McLeod then went to Claresholm, where a settlement of the proceedings was effected, with moneys paid by plaintiff, without having obtained any advances from the defendants or either of them. While they were at Claresholm, and before the settlement of the proceedings, plaintiff executed and delivered to McLeod a transfer of the property, but at the time of delivery he stipulated that McLeod should not register it, and the latter then promised that he would not do so. Shortly after their return from Claresholm, McLeod executed a transfer of the property to Malone, and delivered the same to him, to-

gether with the transfer from the plaintiff, whereupon Malone accepted McLeod's draft for $100, and afterwards paid the same. It is admitted by Malone that at the interview during which the transfers were delivered to him, and before he accepted the draft for $100, McLeod notified him that he had promised plaintiff that he would not register the transfers. Malone then informed McLeod that he would register them, and the latter did not forbid him doing so. Malone afterwards registered them, and obtained a certificate of title to the property.

Plaintiff claims a declaration that the certificate of title so issued to defendant Malone was obtained by fraud, an order cancelling the same, and restoring to plaintiff the ownership of the property, subject only to incumbrances created by him, and directing defendant Malone to re-transfer the same to him, an injunction restraining him from dealing with the property except by such re-transfer, and restraining the defendants from interfering with plaintiff's peaceable possession of the property, and damages.

The trial Judge held that defendant Malone was entitled to register the transfers and to obtain the certificate of title, and that, therefore, the plaintiff was not entitled to the relief claimed by him.

In my view, the proper construction to be placed upon the transaction is that McLeod received the transfer from the plaintiff subject to the condition that it should not be registered, and that, as defendant Malone received both transfers with notice of that condition, he must be taken to have held them subject to that condition. Even if the express condition was merely that he (McLeod) should not register them, I think that he could not confer upon the transferee any greater or wider powers than he himself possessed. The fact that McLeod had notice of Malone's intention to register, and offered no objection to his doing so, is not, in my view, a material circumstance, because, even if McLeod was at that time the agent of the plaintiff, there is nothing in the evidence to shew that he had authority as such to waive the condition against registration.

Under the agreement between Malone and McLeod respecting the advance to be made, the former was, in my view, entitled to receive as security for such advances a transfer which he would have the right to register. He knew, or must be taken to have known, that the transfers

he received did not fulfil that requirement, and he would, therefore, have been justified in refusing to make any advances upon them. Having made the advances upon them with that knowledge, he must be taken to have accepted them as transfers which could not be registered. It is unnecessary to consider what their effect as such may be as securities.

I have treated the condition against registration as being applicable to both transfers, although the evidence leaves it open to doubt whether it was applicable to both, or merely to that from plaintiff to McLeod; but the question is not material, because, even if it applied to the latter only, the defendant Malone could not, without its registration, have completed the chain of title or obtained a certificate of title.

In my opinion, the appeal should be allowed with costs, the judgment in favour of defendant Malone set aside, and judgment entered for plaintiff as against him with costs, for the relief claimed by the plaintiff, except as to damages (as to which no evidence was given), and except that defendant Malone should not be directed to re-transfer the property to the plaintiff. Whatever may be the effect of the transfers as securities, the defendant Malone may be entitled to hold them as such, and I therefore think that, in lieu of a direction that he should re-transfer the property to the plaintiff, there should be a direction that registration of the transfer should be cancelled.

SIFTON, C.J., and STUART, J., concurred.

BECK, J.:—On a careful reading and consideration of the evidence, I find these facts:—

Beere expecting to need money at Claresholm, McLeod, his solicitor, arranged with Malone that on Beere executing a transfer of his dwelling-house property to Malone, Malone would honour McLeod's drafts to the amount of $150, more or less. As it turned out, however, Beere had enough money to meet his requirements at Claresholm. While Beere and McLeod were at Claresholm, and before this was ascertained, Beere executed a transfer of the property not to Malone but to McLeod, McLeod promising that, in view of pending negotiations for a loan, he would not register the transfer. McLeod says of this promise: "My promise was absolute. . . . I certainly did not propose to

register it." Beere says that they shook hands on this promise. McLeod, after his return from Claresholm, called on Malone; he produced the transfer from Beere to himself, complete in all respects, and one from himself to Malone, merely signed, but not witnessed.

Malone has throughout asserted that the intention was that he was to get an absolute transfer of the "equity" in the property, upon his paying a sum not exceeding $150. Even if he is in good faith in making this claim, I do not think that was the understanding either of Beere or McLeod.

In any case, it is clear to me that the arrangement amounted merely to an offer on the part of Malone to make the advance (whether by way of loan or purchase money is for the moment at least not important), upon getting a transfer of the equity to himself. At the time McLeod called with the transfers, the offer had not been accepted by Beere, nor acted upon by Malone, and the only one person a party to the arrangement who was interested in its being carried out was McLeod, in order that he might obtain payment of his fee as solicitor for Beere.

McLeod's version of what took place when he brought the transfers to Malone is: "I told him (Malone) that I told Beere the transfer would not be registered." "When Mr. McKenzie was taking the affidavit of execution from the witness (that is, in the transfer from McLeod to Malone), I told Malone that I had promised Beere it should not be registered, and I reminded him that I promised Beere the transfer should not be registered." On a later occasion, when Beere was present, McLeod states he said to Malone, "You know I told you I promised Beere that this transfer would not be registered," and that Malone replied "Yes."

On cross-examination McLeod says: "I did mention the fact, before Mr. McKenzie was in the room, because while Mr. McKenzie was there taking the affidavit from the witness—my signature—I was about to go out, and I repeated about promising Beere that the transfer would not be registered." Malone's deposition taken on his cross-examination for discovery was put in. In it he states, referring to the subsequent occasion when McLeod and Beere called upon him: "Beere came in and said in substance, 'I told McLeod that I did not want that registered, that I was going to get a loan through,' and I do not know what I said: McLeod said, 'Now I told you, Malone, that

I told Beere that I would not register that.'" Malone, in answer to the question, "And you acknowledged?" replied, "I acknowledged it."

Malone in his evidence at the trial says: "McLeod handed me the transfers, and I think I called the junior in and had him witness the signature, and when he was going out he said, "By the way, I promised Beere I would not register those transfers," and I said, 'The devil you did,' or words to that effect. McLeod was going out and we noticed Mr. McKenzie in, and we called him in and had him take the affidavit."

In my opinion, as I have already intimated, the arrangement between Beere, McLeod, and Malone was, up to the occasion on which McLeod handed Malone the transfers, merely an offer by Malone to make an advance. The evidence I have quoted shews, to my mind, that Beere, with the consent of McLeod, who perhaps might have insisted upon Beere carrying out the original arrangement, declined to accept Malone's offer, and Malone therefore was not at liberty to advance any money except upon the basis of acceding to the alteration proposed in the terms, namely, that the transfer was not to be registered.

The position taken by Malone throughout was, as I have said, that he did not take this view of this matter, but claimed that he was entitled to the transfer as a purchaser and therefore to register it. He had, therefore, no intention of accepting Beere's new and—at that time—only proposal. I think, therefore, there never was a concluded contract between Beere and Malone, and that, therefore, Malone was not entitled even to possession of the transfers.

I am not, however, prepared to find that Malone, in obtaining possession of the transfers, or afterwards when making the advance to Beere of $100 by placing that amount to the credit of McLeod on the strength of his having the transfers, was actuated by a fraudulent intent or acted otherwise than under a misapprehension of his rights, and I therefore do not think he should be deprived of the advantage (if any) he may have by reason of the existence of the transfer from Beere to McLeod and that from McLeod to himself, after their registration and the certificates of title founded upon them are cancelled, as, in my opinion, they should be, by this Court.

Some consideration has been given by members of the Court to the question of the disposition of the costs. There is a charge of fraud in the statement of claim. It is put, however, rather as a conclusion of law from the facts stated than as a direct statement of fact, and there appears to be evidence which shews that it is not unlikely that Beere suffered damage by reason of the registration of the transfers, although there is no evidence upon which the amount could be ascertained, and no claim for damages was made in the argument. For these reasons I see no just ground for depriving the appellant of his costs.

I agree that the judgment should go according to the opinion of my brother Scott.

ALBERTA.

JANUARY 18TH, 1908.

FULL COURT.

PURMAL v. TOWN OF MEDICINE HAT.

Municipal Corporation—Gas Supplied by, to Citizens—Liability for Injury to Private Property—Dangerous Substance—Negligence — Charge to Jury—Findings—Evidence.

Appeal by plaintiff from judgment of STUART, J., in favour of defendants, upon the findings of a jury, in an action to recover damages for injuries to plaintiff's property from an explosion of natural gas supplied by defendants.

The appeal was heard by SIFTON, C.J., SCOTT, HARVEY, and BECK, JJ.

W. L. Walsh, K.C., for plaintiff.

James Muir, K.C., for defendants.

HARVEY, J.:—The defendants are a municipal corporation, and have a number of gas wells within their municipality from which they supply the residents of the municipality with natural gas for consumption, and which are under direct

municipal management. The plaintiff was the owner of a house and stable, each adjoining, but on opposite sides, a lane through which a pipe line ran. To the house there was a service pipe from this pipe line, but there was none to the stable, to which, however, there was a service water pipe line crossing the gas pipe line. In the night of 31st October, 1905, some one entering the stable lighted a match, which set fire to an accumulation of escaped gas, which exploded and wrecked and set fire to the stable. A few hours later, when a fire was about to be lighted in the house, a similar explosion and destruction took place, and it is for the damage caused that this action was brought. The gas well in operation nearest to the buildings is between 200 and 300 feet away, but at a distance of between 50 and 100 feet an attempt was made in the spring of 1902 to dig a well, which, after a depth of about 500 feet, was abandoned without gas having been obtained. The plaintiff in his statement of claim alleges that the gas which caused the explosion came from this abandoned well, and that it was due to the defendants' negligence, and therefore he claims damages.

The trial Judge charged the jury that unless they found that the defendants were guilty of negligence, they were entitled to the verdict. Plaintiff's counsel took exception to this charge, and contends here that it is not necessary for the plaintiff to prove negligence, relying on Fletcher v. Rylands, L. R. 3 H. L. 330. Defendants' counsel objects that negligence having been alleged in the pleadings, this position is not open to the plaintiff. In the view I take of the case, it is not necessary to decide this point, but I may point out that in Fletcher v. Rylands negligence was alleged as in this case.

In the case of Fletcher v. Rylands the defendant had built a reservoir to store water on his own land. The water having escaped caused damage to the plaintiff for which the Court held the defendant liable, though there had been no negligence on his part. At p. 339 the Lord Chancellor states the rule of law in the words of Mr. Justice Blackburn in the Court below as follows: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or

perhaps that the escape was the consequence of vis major, or the act of God."

It will be observed that there are several points of distinction between that case and the present one. In the first place, assuming that the gas came from the abandoned well, the defendants did not bring it there, and did not know it was there; in the second place, they had statutory authority to construct gas works and necessarily to store gas; and, in the third place, they were not acting "for their own purposes," in the sense that the defendant Rylands was, as for their private interests, but as a public local government body in the interests of the residents of the municipality, of whom the plaintiff was one.

With reference to the first point of distinction, the case of Smith v. Fletcher, L. R. 7 Ex. 305, is to be considered. In that case the defendants, in working their mines, had made certain excavations on and below the surface, causing hollows and fissures to the workings below. During a heavy rainfall a watercourse across the defendants' lands, which had been diverted by them for their own benefit, overflowed its banks, and the water ran into these hollows and through the fissures into their mine and thence into the plaintiffs' mine, causing damage. The Court of Appeal held that the case was governed by the principle of Fletcher v. Rylands. A careful examination of the decision, however, seems to indicate that it was not based on the principle of the absolute responsibility for a dangerous thing brought on one's land, but rather on the ground of negligence in leaving the hollows so that in the natural course of events damage might result. Bramwell, B., at p. 310, says: "They so dealt with the soil that, if a flood came, the water, instead of spreading itself over the surface and getting away to the proper watercourses innocuously, collected and stopped in the hollow with no outlet but the fissures and cracks. Suppose the rain without a flood falling in this hollow had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine, instead of being left on the surface to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible, could the defendants say they were not liable because they did not cause the rain to fall?" This case was further appealed, and a new trial ordered. The judgment on the subsequent trial was also appealed and went to the House of Lords, where it is reported as Fletcher v. Smith, 3 App. Cas. 781. The decision there was that the defendants

could not be held liable for neglect in leaving the hollows in the proper workings of their mines, but that the answers of the jury established negligence in the diversion of the water-courses causing the damage.

It appears to me, therefore, that this case does not extend the principle of Fletcher v. Rylands to the case at bar, nor on principle does it appear to me that it can be so extended, for if a defendant is to be held liable without negligence, such liability can surely only attach to cases where the defendant knows or ought to know of the presence of the danger, which fact, under the circumstances of the case, may fix him with a special responsibility.

I am inclined to the opinion that each of the other points of distinction is such in principle, and in itself renders the authority of Fletcher v. Rylands inapplicable; but, in view of my decision on the other point, it is not necessary to consider them more fully.

I can then see no ground, nor was any other ground suggested, for rendering the defendants liable, in the absence of negligence, and I am therefore of opinion that there was no misdirection.

The only question, therefore, that remains to consider is, whether there was evidence on which the jury might find a verdict for the defendants. I do not think it necessary to call attention to the evidence in detail, for it appears to me, after a perusal of the evidence, that there was plenty of evidence to justify the jury in coming to either conclusion, that the gas in question did not come from the abandoned well as alleged in the statement of claim, or that, if it did, its escape was not due to any negligence of the defendants.

The appeal should be dismissed with costs.

SIFTON, C.J., and SCOTT, J., concurred.

BECK, J.:—The trial Judge in his charge to the jury said: "It seems to me that the council of the municipality were authorized to carry on their gas works and get gas in any way, either artificially or by boring for natural gas, and they were not confined by the Ordinance to the manufacturing of artificial gas. That being so, they were exercising in what they did statutory powers, and that places them in a different position to an individual. If what they did was necessary in the exercise of their statutory powers, and I think it was, then they are not liable for what they did

unless they did it negligently. . . . They were dealing with what is admitted to be a rather dangerous substance; and, that being so, they were bound to exercise the precaution that a reasonable man ought to exercise when he is dealing with a dangerous substance."

Exception was taken at the trial by counsel for the plaintiff to the charge, on the ground that there was no distinction between the liability of an individual and that of a corporation merely authorized (in the sense of given permission) to undertake a particular work.

On the argument of the appeal Mr. Walsh urged the same contention. In my opinion, the direction of the trial Judge, taking not detached sentences and modifying the primary meaning of the words (e.g., the word "necessary") by the context, was substantially right as applied to the facts of the present case.

Mr. Walsh contended that the present case falls within the rule in Fletcher v. Rylands, L. R. 3 H. L. 330. Fletcher v. Rylands was a case of an individual storing water on his own land for his own purposes.

In Green v. Chelsea Waterworks Co., 10 Times L. R. 259, it was held by the Court of Appeal, affirming the decision of the trial Judge, that the doctrine of Fletcher v. Rylands is not applicable to a company acting without negligence under statutory authority, Lindley, L.J., remarking that it was possible that the principle of Fletcher v. Rylands might have been applied to companies having statutory authority to make railways or carry water, but the Court had declined to extend it to such cases. The statute under which the company in that case were exercising their authority, however, not merely empowered the company to construct the work, but imposed upon them the obligation of constructing and maintaining it.

Mr. Walsh urged that a distinction exists founded on the question whether the authorizing statute imposes an obligation or merely confers permission. I think such a distinction does exist, but only with the limited effect that where the legislature directs that a thing shall at all events be done the doing of which, if not authorized by the legislature, would entitle any one to an action, the right of action (a right to compensation being usually given) is taken away in respect of damages necessarily resulting from the exercise of the powers conferred by the legislature: Hammersmith R. W. Co. v. Brand, L. R. 4 H. L. 171.

In Ruling Cases, vol. 22, "Railways," sub-tit. II., "Statutory Powers," p. 70, the cases of Rex v. Pease, 4 B. & Ad. 30, Metropolitan Asylum District Manager v. Hill, 6 App. Cas. 193, London, Brighton, and South Coast R. W. Co. v. Truman, 11 App. Cas. 45, and Canadian Pacific R. W. Co. v. Parke, [1899] A. C. 535, are put as the foundation for the following rule: "Where, by an Act of the legislature, persons are authorized and empowered for a public purpose to acquire land within certain limits and to use it in a certain way, and the persons authorized have bona fide acted under the powers, it may be presumed that a duty lay upon them so to act, and they are excused, although the exercise of the powers necessarily involves what would amount to a nuisance at common law. But where the statute is merely permissive—a construction which is aided by the circumstance that no limits are assigned to the site, or that no general public purpose is intended to be served—the exercise of the powers so as to create a nuisance is not presumed to be authorized." See also the annotation to Metropolitan Asylum District Managers v. Hill, in Ruling Cases, vol. 16, "Local Government," p. 556.

The distinction just pointed out is not of importance in the present case, inasmuch as there is no question of the work undertaken by the defendant municipality being a nuisance.

In Barnaby v. Lancaster Canal Co., 11 A. & E. 223, it was held that a body authorized by statute to construct and maintain a work, and having a right to levy, for its own profit, tolls for its use, was liable for negligence in the event of damage arising from non-repair, and the principle would apply to negligence in the conduct of the undertaking. This case was approved in Mersey Docks and Harbour Board Trustees v. Gibbs, L. R. 1 H. L. 93, where it was held that the principle on which a private person or a company is liable for damage occasioned by the neglect of servants applies to a corporation which has intrusted by statute to perform certain works and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or company, are not applicable to the use of the individual corporator or to that of the corporation, but are devoted to the maintenance of the works, and in case of any surplus existing the tolls themselves are to be proportionately diminished.

No distinction, as far as I have been able to find, exists in respect of liability for negligence made between bodies authorized and obliged and those authorized and merely permitted by statute to exercise their powers..

I am, therefore, clearly of opinion that the defendant municipality were liable, if at all, on the ground of negligence, and not otherwise, and that therefore—to repeat—the trial Judge's charge to the jury was not open to the objection taken to it.

Having considered the evidence, I am of opinion that there was sufficient evidence to make it improper for the trial Judge to withdraw the case from the jury, both on the question of whether or not the gas which caused the explosion came from "the Purmal well," and, if it did, whether or not the defendants were guilty of negligence with respect to that well, and that the jury might reasonably find in favour of the defendants on both questions.

I therefore think that the appeal should be dismissed with costs.

ALBERTA.

TAYLOR, DIST. CO. J. JANUARY 18TH, 1908.

TRIAL.

McCAULEY v. POWELL.

Mechanics' Liens—Lien of Sub-contractor—Settlement between Contractor and Owner—Payment in Cash and by Promissory Note—Time at which Lien comes into Existence—Mechanics' Lien Act, sec. 32—Construction.

Action to enforce a mechanic's lien, begun by originating summons under the Mechanics' Lien Act.

J. K. Macdonald, for plaintiff.

J. T. C. Colliston, for defendant Powell.

TAYLOR. DIST. CO. J.:—The defendant Copp entered into a contract to make certain repairs to a store belonging to defendant Powell.

Copp sublet a part of the work to the plaintiff. The plaintiff completed his work on 16th October, 1907, and on 14th November following filed a lien for $60, being the amount due him under his sub-contract.

On 7th November Powell and Copp made a settlement, and Powell gave to Copp cash $200 and a note for the balance, amounting to $475.50, payable in one month. Copp discounted this note in the Traders Bank, Edmonton. The bank notified Powell of this by letter dated 20th November. This letter is the only evidence I have as to the time the note was discounted, and I must presume that the letter was sent to Powell on the same date that the bank received the note.

On the return of the originating summons Powell was the only defendant who was represented, and I have no evidence that any of the other defendants were served or had appeared.

Counsel for Powell, however, did not dispute the plaintiff's claim or the proceedings. He relied on his settlement with Copp to bar the claim of the plaintiff, and referred to sec. 32 of the Act.

In the first place, I think it is clear from the Act that the lien comes into existence as soon as the work begins or any materials are delivered: sec. 2, sub-sec. 4; sec. 13.

At the time of the settlement, then, this lien was in existence.

Section 32 says: "No lien, except for more than 6 weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor."

Did the legislature intend this to mean that so long as the owner paid the contractors the full amount under the contract he had no further liability except for six weeks' wages? That he could make a settlement at any time with the contractor or pay him in advance, and cut out all liens with the exception of the above for wages?

If such is the meaning, where is there any protection to lien-holders? Would they not have just as good a remedy by taking garnishee proceedings?

I cannot think that such a meaning was intended by the legislature.

In discussing this section, Stuart, J., in Swanson v. Mollison, 6 W. L. R. 678, says: "Having once arisen," speaking

of the lien, "I am of opinion that the effect of the new Act is to make the lien attach to the extent of any sum which may at any time thereafter become owing and payable by the owners to the contractor."

I would go a step further, and say that it attaches to the extent of any sum which has not been actually paid in the construction so far as it has gone—that the owner should see that every dollar he has paid has been expended in the work. This does not seem to me unreasonable. In this case the owner, Powell, does not seem to have taken any such precaution. He made a settlement with the contractor, and did not trouble himself further about the matter until the plaintiff had started his action.

Counsel for the defendant Powell argued that his client had made the settlement in good faith and without notice.

He may have made the settlement in good faith, or have relied on Copp paying all claims, but he must have had notice, because, as I have said before, and I think it is clear, the lien comes into existence as soon as the work begins or the materials commence to be furnished, and the owner must be considered as having had, if not actual, at least constructive, notice that the lien was in existence.

The filing of certain papers is not for the purpose of giving the owner notice, but merely a statutory provision to keep the lien alive.

Besides this, there is another point in favour of the plaintiff. Section 17 of the Act says that payment shall be made in money. In the settlement only $200 was paid in money; the balance was settled by a promise to pay money in a month's time. So that the actual balance of the money was not paid until 10th December. The fact that the promissory note passed into the hands of a third party does not seem to me to make any difference.

For these reasons, I hold that the plaintiff is entitled to his lien on the premises. As I have no evidence before me of the standing of the other defendants, or that they have been served, I am unable to give any directions for enforcing the lien; but will give leave to the plaintiff to make any further applications that may be necessary.

ALBERTA.

STUART, J. JANUARY 21ST, 1908.

CHAMBERS.

IMPERIAL LIFE ASSURANCE CO. OF CANADA v. BEST.

Judgment—Default Judgment—Application to Set aside—Affidavit—Merits of Defence—Arrangement between Solicitors—Conditional Leave to Defend — Payment into Court—Costs.

Motion by defendant to set aside a default judgment and for leave to defend.

T. M. Tweedie, for defendant.

H. W. McLean, for plaintiffs.

STUART, J.:—The affidavit in support of the application made by the defendant admits the general liability, but alleges that a promissory note was given by the defendant and accepted by the plaintiffs in satisfaction of the debt, and that the note is not yet wholly due. By an affidavit filed on behalf of the plaintiffs it appears that the document in question is in the following terms:—

"Calgary, Canada, 13th April, 1907.

"The Imperial Life Assurance Company of Canada,
"Toronto, Ontario.

"I, James Frederick Best, of Calgary, Alberta, provincial manager Sovereign Life Assurance Company, hereby acknowledge that I am indebted to you in the sum of $1,446.52 in respect of my contract with you, and I hereby agree to pay you the said sum of $1,446.52 in monthly instalments of $25 each, the first payment to be made on the 13th May, 1907. "J. F. Best."

The affidavit of the defendant does not set forth this document, but simply states "that on the 13th day of April, 1907, I made and delivered to the plaintiffs, through their solicitors, a certain instalment promissory note, which was received and accepted by the plaintiffs in discharge of the

plaintiffs' claim." In the view I take of the case, it is not necessary for me to decide the question whether the document quoted above is or is not a promissory note. Even assuming that it is, the law is clear that the taking of a promissory note does not extinguish the existing liability, unless it is the intention of the parties that it should do so. The defendant's affidavit merely alleges the acceptance by the plaintiffs of the said document in satisfaction of their claim. This, I think, is put rather as matter of pleading than as direct evidence of the facts constituting acceptance. Where a judgment has been properly signed, the practice is stated in Annual Practice, 1907, p. 335, to be that "it is an almost inflexible rule that there must be an affidavit of merits, i.e., an affidavit stating facts shewing a substantial ground of defence." In my view, the defendant should have gone further, and stated clearly what facts occurred from which the inference of acceptance might properly be made. The suggestion that the plaintiffs or their solicitor would accept an instalment note, which would substitute for a present debt, amounting to $1,446.52, a scattered and deferred liability spreading over nearly five years, is so extremely improbable that I think the exact facts from which the Court would be asked to find such an acceptance ought to have been set forth. The affidavit does not, I think, comply with the rule as above stated. As I say, it is drawn rather as a pleading than anything else. Even if the defendant is entitled to defend at all, this is clearly one of those cases in which it can only be upon terms. If the defendant, therefore, cares to pay the amount of the judgment into Court within 5 days, he may have the order asked for.

As to the question of professional courtesy, I rather think that it might in this case be not improperly disregarded. Even if a defence had been entered, Mr. McLean would, I think, have been entitled to apply to set it aside, on the ground that there was no defence on the merits, and the same result would have been reached as far as the claim itself is concerned. The defence appears to me to be so extremely doubtful, that I think Mr. McLean was, in the circumstances, justified in looking upon it merely as a scheme to gain time. As Mr. Tweedie only swears to an impression he received, while Mr. McLean swears positively that no promise was given, but that in fact he said he would proceed to sign judgment in default of pleading, I do not see that Mr. Tweedie has anything to complain of. If, therefore, advantage is

taken of the conditional leave now given, there must also be the further usual condition of immediate payment of costs of the judgment and of this application. Otherwise the application will be dismissed with costs.

ALBERTA.

SCOTT, J. JANUARY 31ST, 1908.

CHAMBERS.

YORK v. SECORD.

Practice — Affidavits Filed on Interlocutory Application— Scandal — Prolixity — Irrelevancy — Embarrassment— Application to Remove from Files—Partnership Action.

Application by plaintiff for an order that the affidavits of the defendant, and of William Richardson, Angus Johnston, James D. Martin, Frederick O. Peacock, and Joseph Hostyn, filed by the defendant, be struck off and removed from the files of this Court, on the grounds that they are prolix, scandalous, and irrelevant, and that they contravene Rule 295 of the Judicature Ordinance.

C. C. McCaul, K.C., and O. M. Biggar, for plaintiff.

C. F. Newell, for defendant.

SCOTT, J.:—This is an action to wind up a partnership existing between plaintiff and defendant as hotel-keepers, under which they carried on business in 4 hotels in the city of Edmonton known as "The Alberta," "The Windsor," "The King Edward," and "The Yale."

The affidavits complained of were filed in answer to an application by the plaintiff (1st) to continue until the trial or final disposition of the action the interim receiver; (2nd) to settle and approve a scheme for the temporary conduct, management, and financing of the affairs of the partnership during the winding-up thereof; (3rd) to approve of the borrowing of the sum of $4,500 on notes of the receiver to meet the temporary exigencies of the business; and (4th) for such further directions as might be necessary for the continuance of the business as a running concern pending the winding-up.

The affidavits filed by the plaintiff upon the last mentioned application plainly disclose his intention to apply that he himself should be continued as manager of the several hotels and the business, and receive an allowance therefor, that the present interim receiver should be continued as receiver, and that the plaintiff's solicitor should be appointed solicitor to the receiver.

During the argument of this application, counsel for the plaintiff referred to certain paragraphs of the affidavit of the defendant and to the affidavit of Hostyn as being open to some one or more of the objections raised in the summons. Counsel did not refer to the other affidavits mentioned in the summons, though, after the conclusion of their argument, they stated that they objected to all the affidavits mentioned therein.

Paragraphs 2 to 12, inclusive, of defendant's affidavit, which are objected to, relate plainly to the dealings between plaintiff and defendant in connection with the acquiring of the business of the different hotels and the assets and liabilities of the partnership. They shew, among other things, that the defendant's interest in the partnership assets is far in excess of that of the plaintiff. Counsel for defendant states that these are material allegations, as the Court in appointing a receiver or manager will, under certain circumstances, give greater consideration to the wishes of the partner having the greater interest in the estate. I am not prepared to hold that such is not the case.

The paragraphs referred to also relate to the manner in which the "Alberta," "Windsor," and "King Edward" hotels (which are not the property of the partnership) were acquired. They shew that those properties were bought by plaintiff and defendant and one Macdougall in equal shares; that the purchase money of the "Alberta" and "Windsor" hotels was wholly paid by defendant and Macdougall; and that plaintiff gave them a mortgage thereon for his share of the purchase money, and that he is still indebted to them therefor and for other sums, and also to the defendant in considerable sums apart from the partnership business. I am bound to say that I entertain some doubt as to whether these allegations are relevant, but, as it may be open to question whether the fact of the plaintiff being largely indebted both outside of as well as in connection with the partnership business may not or should not have some influence upon the Court in

considering the question of his appointment as manager during the winding-up proceedings, I will not direct them to be struck out.

Paragraph 6 is also objected to as misleading, in that the principal of the mortgage referred is alleged to be still unpaid, and it is not alleged that the principal is overdue. I doubt whether this objection is open to the plaintiff under his summons, but, even if it is, it is a bare allegation of fact and must be taken for what it is worth. The words do not convey that the mortgage is overdue, and I cannot assume that they were intended to convey that impression.

Paragraph 13, objected to, relates to a demand alleged by plaintiff to have been made upon him for the payment of taxes. Defendant alleges his belief that such allegation of the plaintiff is untrue, and gives the source of his information. He then proceeds to allege that he does not think such demand was made, and that the payment of such taxes was a scheme between the plaintiff and the receiver to assist the former in other actions then pending. The objection taken is that the latter allegation is not one of fact, but merely an expression of opinion. The words "I do not think" are inapt to express the meaning intended to be conveyed, which probably was that which would be conveyed by the words "I do not believe." When one party alleges that he did an act for a certain reason, I think it is competent for the opposite party to shew that the reason did not exist, and to express his belief that it was done for a certain other reason. I may point out, however, that upon a strict literal construction of the latter part of the paragraph, its effect is the reverse of what the defendant intended to convey.

Paragraph 17 is objected to as immaterial and argumentative. I think it is material, as it gives reasons why the advances applied for in the summons should not be made. It may be argumentative to some extent, but not to such an extent as would justify an application to strike out the argumentative portion.

Paragraph 16 is objected to as not stating facts, and 17 as being scandalous. It states reasons why the plaintiff's solicitor as such should not be appointed solicitor to the receiver, and to my mind they are reasons well worthy of consideration. Paragraph 17 mentions the name of another solicitor as being "fitter" for the position. Defendant's counsel stated that the word "fitter" was a misprint in the affidavit and that the word "fitted" was intended to be used, and

counsel for the plaintiff accepted his statement. Even apart from that, I do not think that defendant's expression of opinion that one solicitor was fitter than another for a certain position should be treated as scandalous matter.

Paragraph 19 and the sub-paragraphs thereof relate to the question of the interim receiver's fitness for the position, and are as such relevant. Paragraphs 20, 21, 22, 23, and 24 are mainly confined to relevant facts. It is true some of them contain matter of argument, but to an extent not worth consideration.

Paragraphs 26, 27, and 31 are objected to as prolix and irrelevant. They are short paragraphs identifying certain statements of account of the "Windsor," "Alberta," and "King Edward" hotels, which I am informed contain some 30 or 40 folios of matter. I do not think it necessary to peruse them upon this application, as counsel for defendant states that they are brought in for the purpose of shewing a serious leakage in the bar of one or more of the hotels during the time the interim receiver was manager thereof, and while he was interim receiver, and that he should have prevented the same. Such being the case, they may be and probably are relevant, but, even if they are not, or are only partly so, their being referred to merely as exhibits to an affidavit will not constitute prolixity in the affidavit: see Walker v. Poole, 21 Ch. D. 35.

Paragraph 29, objected to, is defective, in that it does not allege that plaintiff placed the piano referred to in the "King Edward" hotel, but that defect cannot embarrass the plaintiff, and it is not open to any of the objections relied upon.

Objection was taken to the affidavit of Joseph Hostyn, on the ground that it gives what plaintiff's counsel contend are unnecessary details of the circumstances under which a cheque is alleged to have been given by plaintiff upon the partnership bank account for his private debt and marked by him "coal account." The affidavit not only alleges that it was not given for coal or for a partnership debt, but also discloses the nature of the transaction for which it was given. It may be that the latter was unnecessary, but I am not prepared to hold that defendant was not entitled to disclose it.

The raising of the objection that the affidavits referred to contravene Rule 295 appeared to have been an afterthought, as it was raised for the first time by amendment on the hearing of the application. In defendant's affidavit in all cases

(with two exceptions) where he alleges his belief as to a state of facts, reasonable grounds for such belief are stated in the same paragraph, though in some cases he has omitted, doubtless through carelessness in drawing up the affidavit, to state that he founds his belief upon these grounds.

One exception is that in paragraph 12 he alleges his belief that if the hotel properties were put up for sale they would not realize the amount of the partnership liabilities. This, however, is merely an expression of opinion as to the value of the properties, and it is unnecessary that he should state the grounds for such an opinion. The other exception is paragraph 42, in which no grounds are shewn for the belief there alleged, and it is therefore valueless as evidence, but I cannot see that plaintiff will be in any way prejudiced by it. If attention is called to it on the hearing of the main application, the Court will be bound to treat it as valueless. I see no object in plaintiff applying in the meantime to strike it out, except to make costs for the purpose of delaying the proceedings.

I have referred to all those portions of the affidavits complained of to which my attention was called by counsel for the plaintiff.

I do not consider it my duty to scrutinize the other portions in order to ascertain whether they are open to objection.

I dismiss the application with costs to the defendant in any event on final taxation.

SASKATCHEWAN.

NEWLANDS, J. JULY 24TH, 1907.

TRIAL.

CYR v. O'FLYNN.

Building Contract—Action for Balance of Contract Price—Satisfaction of Architect—Certificate—Refusal of—Fraud and Collusion—Construction of Contract—Condition Precedent—Waiver—Acceptance of Work—New Contract for Extra Work — Counterclaim — Delay in Completion of Completion of Building — Loss of Profits — Remedying Defects—Evidence—Mechanic's Lien—Costs.

Action to recover the amount due under a building contract and to enforce a mechanic's lien therefor.

H. V. Bigelow, Regina, for plaintiff.

Wood, Regina, for defendant.

NEWLANDS. J.:—On 1st February, 1906, the plaintiff entered into an agreement with the defendant to build a brick veneer annex to his hotel at Davidson, Saskatchewan, according to certain plans and specifications signed by them at the time the contract was executed. Certain changes were made in the plans and specifications as originally drawn, and these are embodied in the contract as signed. The price for the building was to be $4,500.

The following provision appears in the contract: "The said hotel is to be built and finished to the satisfaction of the architect who drew the specifications, plans, and drawings, or such other person as the said Thomas O'Flynn shall nominate for that purpose."

One Thomas Campbell was the architect who drew the plans and specifications, but he was not to be found, and no other architect was employed by defendant during the construction of the building; but, after it was said to be completed, the defendant employed W. W. LaChance, an architect residing at Saskatoon, to report on the building, and he made a report in writing to defendant that the building was not completed according to the plans and specifications, and gave particulars wherein the building was not so completed. He also wrote to plaintiff the following letter:—

"Saskatoon, Aug. 18th, '06.

"Mr. Wm. Cyr,

"Davidson, Sask.

(Re Davidson Hotel, Mr. T. O'Flynn.)

"Dear Sir.—I am instructed by Mr. Thomas O'Flynn to act as his architect and report on the condition of the building that you have contracted with him to build and complete according to plans and specifications prepared by Mr. Duncan Campbell, architect. I have examined the building thoroughly, and have compared the work with the specifications, and find that Mr. O'Flynn is entitled to a different class of materials and workmanship than that given by you as contractor for this work. The building is far from being completed, and I would ask that you take immediate steps to remedy the defects and complete the building in a workmanlike manner and with as little delay as possible; failing in this, I shall be justified in bringing in other contractors to complete the work, and deduct whatsoever the amount may be from any money due you on account. Awaiting your early reply, I remain sincerely yours.

"W. W. La Chance."

Plaintiff, after receipt of this letter, went to Saskatoon and saw Mr. La Chance, and he states that La Chance specified certain particulars in which the building was incomplete. These were that the oil and varnish work was not finished, some glass was broken in the windows and would have to be replaced, locks should be put on the windows downstairs, and two hooks on the scuttle to the roof. Plaintiff made these repairs, and then wrote La Chance asking for a certificate that the work was completed. La Chance replied that he would write defendant to see if work was completed, which he did, and received a reply that the above repairs had been done, but that several other repairs and alterations mentioned in his report had not been made. Thereupon Mr. La Chance refused to give a certificate that the work was completed. As to what happened between plaintiff and La Chance in Saskatoon there is considerable dispute. Plaintiff states that he only asked him to make the above mentioned repairs. On being examined for discovery, La Chance remembered very little of the conversation between himself and plaintiff, but at the trial he stated that, after going over the plans, specifications, and his report, he had refreshed his memory, and he then stated that he had gone over his report with plaintiff and pointed out to him all the repairs and alterations mentioned therein which plaintiff would have to do before he could give a certificate that the building was completed. This seems to me to be more likely to be true than the plaintiff's story. It is certainly what an architect would do, and, as there is a conflict of testimony between the two, I am of the opinion that the evidence of Mr. La Chance is more entitled to credit than that of plaintiff.

The plaintiff joined La Chance as a defendant, and alleges against him that he was the person nominated by the defendant to whose satisfaction the hotel was to be built and finished; that he applied to him for a certificate that the hotel was built and finished to his satisfaction, but that said defendant La Chance, acting in collusion with the defendant O'Flynn, and by the procurement of the defendant O'Flynn, had fraudulently neglected and refused to give the same to the plaintiff, whereby he was prevented from getting the money due him under said contract; also that he had applied to said defendant La Chance for a certificate that said hotel was built and finished to his satisfaction, but that, acting at the request of the defendant O'Flynn, and by his improper interposition, unfairly and partially refused to give the same to

plaintiff, whereby the plaintiff was prevented from getting the money due him under said contract.

There is, in my opinion, absolutely no evidence to support the plaintiff's claim against defendant La Chance, and I can find no evidence even suggesting that he acted improperly or colluded in any way with defendant O'Flynn, and therefore dismiss the action against him with costs.

The defendant O'Flynn pleads in bar of the action that in accordance with the terms of the agreement he nominated W. W. La Chance as the person to whose satisfaction the building should be built and completed, and that the building was not built and completed to the satisfaction of La Chance or at all.

The first question that I have to decide is, was it a condition precedent to the payment of the contract price to plaintiff that said La Chance should give a certificate that the building was built and completed to his satisfaction?

The terms of the contract upon this question are as follows: "The said hotel is to be built and finished to the satisfaction of the architect who drew the said specifications, plans, and drawings, or such other person as the said Thomas O'Flynn shall nominate for that purpose. . . The said sum of $4,500 shall be paid within one month after the completion of the said hotel to the satisfaction of said architect, or other person as altered by this agreement."

These two clauses, taken together, make it necessary that the architect should be satisfied that the building is completed according to the plans and specifications as altered by the agreement. A certificate of the architect would, therefore, be a condition precedent to the plaintiff's right to recover. The rule is stated in Hudson, 3rd ed., p. 366, to be: "In the absence of express words, it may be laid down as a general rule of construction that certificates are only conditions precedent in cases where the engineer or architect has to exercise his judgment and skill in making his certificate, or has to discharge other duties of a quasi-judicial character, as, for instance, in valuing work or materials or approving the same."

In this case there is no doubt but that the architect had to exercise judgment and skill in approving of the same, and the case would, therefore, come within the above rule of a certificate being a condition precedent before the plaintiff could recover.

Then, did defendant prevent the performance of the contract, or rather did he waive the condition requiring a certificate, by not appointing an architect until the building was completed? The first clause of the contract referred to says the hotel is to be "built and finished to the satisfaction of the architect," and the other clause referred to says the $4,500 is to be paid one month after "the completion of said hotel to the satisfaction of said architect." There would, therefore, be required only a certificate of the completion of the contract to the architect's satisfaction, and, as this could not be given until after the completion of the building, I think defendant performed his part of the contract by appointing La Chance after the completion of the building.

The plaintiff also alleges that defendant acted unfairly in not telling La Chance that he had agreed to alterations in the plans and specifications other than those mentioned in the agreement. The principal one referred to is the leaving off of the cornice on the front of the building. Plaintiff and one witness swear that this was agreed to by defendant in the presence of defendant's bar-tender, because, on account of the lowering of the building, the cornice would be too heavy. Both the defendant and his bar-tender deny any such agreement, and, therefore, I must hold that plaintiff has not proved that the written contract was altered in this particular. That being the case, I see no evidence that defendant acted unfairly in connection with the architect.

It is also alleged by plaintiff that defendant accepted the building and approved of the plaintiff's work. The evidence is to the effect that plaintiff occupied the building as fast as it was completed, and expressed himself as satisfied with the plaintiff's work inside the building, but there is no evidence that defendant had any technical knowledge of building, and his statement that he was pleased with plaintiff's work would not do away with the necessity of the architect's certificate. Nor was his occupation of the building such an acceptance as would do away with such certificate. Plaintiff cannot, therefore, recover the balance alleged to be due him on the contract.

While this work was in progress, plaintiff and defendant made a new contract for certain other work for which I think plaintiff is entitled to recover. I allow the following items:—

To digging cellar under bar as per agree- with O'Flynn made and entered into verbally on or about the 1st day of May, 1906.	$ 20 00
To contract price for building addition connecting building, constructed under contract of the 1st of February, with building on lot No. 1 in block 2, as agreed between the said Wm. Cyr and the said Thomas O'Flynn, on or about the 1st day of May. 1906	400 00
To building bar in such last mentioned building as agreed	75 00
To building work board under bar as agreed	8 00
To building an arch over bar at the request of said Thomas O'Flynn and for him, lumber supplied allowed at.....	15 00
To building sample-room in rear of hotel, providing work and materials according to contract price	410 00
To repairing office in hotel	5 00
To 1 Yale lock on pantry	2 50
To 1 lock on dining room.....	3 00
To 1 pane of glass in front hall.....	1 75
To taking down porch	1 00

Against these extras there is a credit of $300 paid by defendant.

The other items charged as extra I do not think have been proved.

As to defendant's counterclaim, I allow him nothing for loss of profits. There is no time fixed in the contract for the completion of the building. Plaintiff only agreed to use due and reasonable diligence in building and completing the hotel, and until such completion (weather permitting) keep a sufficient staff of competent and skilled workmen at work on said hotel at all proper times. There is no evidence that he did not do this.

As to the counterclaim for remedying defects, defendant has not paid out anything for this purpose, and cannot therefore recover.

As to the amounts voluntarily paid on the original contract, I am not in a position to say that defendant has overpaid plaintiff, and he cannot, therefore, recover them back, excepting the payment of $40 to Rogers and costs of lien,

which were paid subsequent to the architect inspecting the building, and defendant is, I think, entitled to recover that back. He is also entitled to the claim for money lent, namely, $47, as the evidence is in his favour on this item.

The evidence being contradictory on the item of $30 for lumber, the defendant has not proved that he is entitled to it to my satisfaction.

The plaintiff's lien herein will be discharged.

There will be judgment for the plaintiff for the amount found to be due him, less $300 paid and the amount allowed defendant on his counterclaim. Each party will have his costs on the issues on which he was successful.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 3RD, 1908.

CHAMBERS.

DIEBERT v. DIEBERT.

Husband and Wife—Interim Alimony—Quantum—Evidence.

Motion by plaintiff in an action for alimony for an order for interim alimony.

W. M. Martin, Regina, for plaintiff.

J. A. Allen, Regina, for defendant.

WETMORE, C.J.:—The difficulty I have experienced is in arriving at the income of the defendant so as to fix the amount of interim alimony to be allowed. The evidence with respect to that fact is of the most vague character. The amended statement of claim alleges that the defendant is the owner of real estate worth from $8,000 to $10,000, and that he is also the owner of certain specified personal property of the value of at least $2,000, and that he derives an annual income from farming of from $1,500 to $1,800. The defendant in his statement of defence absolutely denies all this. The only testimony as to the property and income of the defendant is contained in the plaintiff's affidavit, in which she states that she has read over this amended statement of claim, and that

all the statements therein contained are true in substance and in fact. This is not denied by any affidavit on the part of the defendant. I will accept, therefore, the fact to be proved that the income of the defendant is $1,500 a year.

The practice in England appears to be ordinarily to fix the interim alimony at one-fifth of the joint income of the parties. The plaintiff here has no income. I will, therefore, fix the alimony at $25 a month, and order that amount to be paid, and the defendant to pay the plaintiff's costs of this application.

SASKATCHEWAN

LAMONT, J. JANUARY 4TH, 1908.

CHAMBERS.

UNION TRUST CO. v. DUPLAT.

Costs — Mortgage—Foreclosure—Unnecessary Party—Prior Incumbrancer.

Application by plaintiffs for an order foreclosing the right of the defendants in the property set out in a mortgage. One of the defendants was the Minister of the Interior, as the holder of a seed grain lien, registered against the property in question prior to the mortgage of the plaintiffs.

Davidson (Balfour, Martin, and Casey), for plaintiffs.

Ross, for the defendant the Minister of the Interior.

LAMONT, J.:—On the hearing I made an order nisi for foreclosure, subject to the prior incumbrance of the Minister of the Interior under the seed grain lien, but reserved the question of costs. Mr. Ross, who appeared for the Minister of the Interior, claimed to be entitled to costs, on the grounds:—

1. That, having a prior claim, the Minister of the Interior should not have been served at all, but having been served with a summons asking for foreclosure as against all the defendants, it was necessary to appear and defend.

2. That the summons was served ex juris without an order, and was therefore a nullity.

Plaintiffs' counsel argued that, if service was a nullity, defendant should not have appeared.

As the Court, in granting a foreclosure order, only forecloses the rights of subsequent incumbrancers to redeem the property, and reserves the right of prior incumbrancers, it is unnecessary to serve prior incumbrancers with a copy of the summons. In this case the service was unnecessary and useless, and the costs of service ought to be borne by the plaintiffs personally, and not to be charged against the property being foreclosed.

The costs of the application will be to the plaintiffs, except the costs of the defendant the Minister of the Interior, which shall be paid by the plaintiffs personally, and not charged against the property.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 4TH, 1908.

TRIAL.

MALONEY v. WHITLOCK.

Vendor and Purchaser — Contract for Sale of Land—Purchaser Ready to Complete Payment—Vendor Refusing to Execute Deed unless it Contained Restrictive Clause—Restraint on Alienation — Invalidity — Dispensing with Tender—Assignment of Contract—Specific Performance.

Action for specific performance of a contract for the sale of land.

Bryant, for plaintiff.

F. W. G. Haultain, K.C., for defendant.

WETMORE, C.J.:—The defendant on 7th July, 1904, agreed to sell the land in question to one George Albert McKay for $160, to be paid as follows: $25 on the execution of contract; $67.50 on or before 7th July, 1905; $67.50 on or before 7th July, 1906; all payable with interest at the rate of 6 per cent. per annum. The defendant covenanted

that, on payment of the purchase money and interest as provided in the contract, he would cause to be conveyed or assigned to the purchaser the land in question, subject to the conditions and reservations in the original grant from the Crown, which deed or transfer was to be prepared by the vendor's solicitor, at the expense of the purchaser, and it was also provided in the agreement that the purchaser should, immediately after the execution of the agreement, have the right to possession of the premises, and the right to occupy and enjoy the same until default should be made in the payment of the purchase money and interest at the times mentioned for payment. After containing some further provisions, which I do not consider material to the questions involved in this case, the agreement goes on to provide that the covenants and agreements therein contained should extend to and be binding upon the heirs, executors, administrators, assigns, and successors of the parties to the agreement. Then the agreement contained the following clause: "The purchaser to have the privilege of selling one lot of 40 feet frontage, and the balance to be used as farm land only, and not to be cut up into lots of any description." McKay assigned this agreement and his interest therein to the plaintiff. The first instalment of $25 was paid, and the second instalment due on 7th July, 1905, with interest, was also paid. On 2nd July, 1906, the plaintiff went to the defendant's office and offered to pay the last instalment due on or before 7th July. No tender of the money was made, but plaintiff had the money with him, and was ready and willing to make the payment. The defendant, however, refused to give a conveyance or transfer, except one containing the provision "giving a privilege of selling one lot of land, and that the balance was to be used as farm land only, and not to be cut up into lots." The plaintiff refused to accept the conveyance containing such clause.

It was contended that this action must fail because no tender of the money due was made. I am of opinion that that was not necessary, because the defendant by his conduct rendered the production of the money unnecessary. He absolutely refused to give a conveyance that did not include the clause in question. The question is, whether he had a right to insist upon the conveyance containing such a clause. I am of opinion that such a clause in a deed would be void, as it would be a restraint on alienation.

In In re Lunham, 5 Ir. R. Eq. 170, what was called a fee-farm grant contained a covenant that the grantee, his heirs and assigns, might assign, sublet, or otherwise part with the possession of the demised premises, provided he did not divide them into more than 4 divisions or lots, unless with the consent in writing of the grantor, his heirs and assigns. Flanagan, J., held the covenant to be absolutely void and inoperative, as repugnant to the free power of alienation necessarily implied by a fee-farm grant.

The proposed clause in this case is a restraint upon alienation, and goes much further than that in the case which I have cited. But I am of opinion, reading the whole of this contract, that the clause in question was only intended to give the purchaser power during the time that he held possession of the property under the agreement of sale and before a conveyance was made to him to deal with the property subject to the limitations and conditions contained in such clause. It was contended that, as this offer to pay the money was on 2nd July, 5 days before the last day for payment, it was too soon. This agreement, however, provides that the payment may be made on or before the specified day, and therefore, in my opinion, it was not too soon. At any rate, the defendant made no objection on that ground.

The only objection he raised was, as before stated, to giving any conveyance which did not contain the clause before mentioned. It might be stated that the defendant's right to insist upon this clause being entered in any transfer he might make, was not raised in the pleadings, so far as I can discover. However, as that question was not raised at the trial, I have endeavoured to decide the question which was no doubt raised at the trial.

It appeared in the course of the trial, however, that Maloney on 8th July, 1905, had assigned the contract to one John Eddie as security for the sum of $75.60 and interest. This assignment was indorsed on the agreement. A memorandum was also indorsed on the agreement acknowledging receipt of this $75.60, and interest, which was only signed by Eddie on the date of the trial. It was urged that at the time the offer was made to the defendant the agreement was in Eddie's name, and not the plaintiff's. As a matter of fact, it was established that the payment to Eddie had been made before the plaintiff went to the defendant's office and offered to pay the money.

The plaintiff has paid into Court $71.50. I do not know whether that will represent the amount due on the agreement on 2nd July, 1906. If not, the plaintiff must pay into Court what remains due. It will be a matter for estimation by the clerk, and if the proper amount is paid into Court, or if not upon its being so paid in, the clerk will execute to John Maloney a transfer of the property in question, and thereupon the title of the defendant of, in, and to the said property will vest in the said John Maloney absolutely. The defendant will pay the plaintiff's costs of this action; the money paid into Court to be applied toward satisfaction thereof, and the plaintiff to have execution for the balance.

SASKATCHEWAN.

NEWLANDS, J. JANUARY 5TH, 1908.

TRIAL.

O'FLYNN v. CARSON.

Liquor License Ordinance—Hotel License—Sale or Barter of Intoxicating Liquors in Wholesale Quantities by Licensee —Loan or Supply of Liquors—Contract for Return of Similar Liquors—Illegality.

The parties to this action stated the following question of law in the form of a special case for the opinion of the Court:—

1. The plaintiff, during all the time of the supplying of the goods (intoxicating liquors) hereinafter mentioned, was a holder of an hotel license for the sale of intoxicating liquors in and from the Davidson hotel, at Davidson, Saskatchewan, which he, the plaintiff, was at such time conducting in the usual course of his business as an hotel-keeper. The plaintiff was not at such time the holder of a wholesale or any other license other than an hotel license for the sale of intoxicating liquors.

2. That the defendant was, during the time of the supplying of the said goods (intoxicating liquors), a member of a partnership consisting of himself and two others, such

two other persons being residents of Davidson aforesaid. Such partnership then carried on an hotel business at Davidson, aforesaid, in the American hotel at that place, and the defendant and his said two partners were then, namely, during the time of the supplying of the said liquor by the plaintiff, the holders of an hotel license for the sale of intoxicating liquors in respect of the said American hotel situated at Davidson aforesaid, and were not at such time, nor were any of the said persons, the holders of any wholesale or any other kind of a license for the sale of intoxicating liquors.

3. The defendant, after the time of the supplying of the said goods (intoxicating liquors) to the said partnership for its said business at the American hotel aforesaid, and after the receipt of the plaintiff of the last of the said goods (intoxicating liquors) which were returned to him by the said partnership, took over the said partnership and the American hotel premises, and the defendant, at the time of this action, was the sole proprietor of the said American hotel. The goods (intoxicating liquors) which were returned to the plaintiff by the partnership were returned to him from and out of the said American hotel premises by a member of the said partnership other than the defendant, such partner being one of the said licensees.

4. The plaintiff during the winter of 1906 and 1907, from and out of his said licensed premises, lent the said partnership doing business at the American hotel aforesaid, goods (intoxicating liquors) of the value of $197.80, and the following were the terms upon which the said goods (intoxicating liquors) were lent or supplied, namely, that the said partnership would return to him, the plaintiff, goods (intoxicating liquors) of the same quantity, quality, and value; that the goods (intoxicating liquors) so lent by the plaintiff were lent in quantities in excess of a half a gallon of ale, beer, or porter at any one time, and in quantities in excess of one quart of wine or spirits at any one time. The reason for the loan in question was the inability of the defendant to have shipped in intoxicating liquors for use in his hotel, owing to the continued snow blockage on the Canadian Northern Railway.

5. The said partnership returned to the plaintiff, from and out of its hotel premises, namely, the American hotel, goods (intoxicating liquors) of the same quantity, quality,

and value, to the value of $84.45, but did not return any further liquor. The last of the liquors returned were returned during the spring of 1907.

6. The defendant contends that under these facts the plaintiff cannot recover as claimed, and that the transaction hereinbefore stated is illegal and contrary to the provisions of the Liquor License Ordinance, namely, secs. 70, 71, 81, 85 (as re-enacted). This the plaintiff denies.

7. It is agreed that the pleadings may be referred to.

Question.—Is the plaintiff entitled to recover in this action?

C. E. D. Wood, for plaintiff.

J. F. Frame, for defendant.

NEWLANDS, J.:—Section 85 of the Liquor License Ordinance provides that any person who sells or barters liquor of any kind, without the license therefor by law required, shall be guilty of an offence, and on summary conviction thereof shall be liable to a penalty. Now this transaction is not a bailment, because the property in the goods passed. They were to be used by the defendant as his own, and the defendant was to return not the identical goods but goods of the same kind and quality. See South Australian Insurance Co. v. Randell, L. R. 3 P. C. 101. It is, therefore, either a sale or barter. The meaning given to the word "barter" in Stroud's Judicial Dictionary, p. 168, is the exchange of wares for wares. Now this is what was done in this case, for, though the plaintiff only lent the liquor to the defendant, it was to be returned to him in the same quantity and kind. The amount of liquor lent and to be returned was more than either party could sell under their respective licenses. The transaction was, therefore, an offence under sec. 85, and, as the imposition of a penalty for the contravention of a statute avoids a contract against the statute (Brown v. Moore, 32 S. C. R. 93), the plaintiff cannot recover.

As both the plaintiff and defendant were parties to this illegal agreement, there will be no costs to either party.

SASKATCHEWAN.

LAMONT, J. JANUARY 6TH, 1908.

TRIAL.

STILL v. WATSON.

Contract—Wintering Cattle—Terms of Contract—Redelivery —Evidence—Corroboration — Damages for Detention— Counterclaim.

Action for the value of certain cattle taken by the defendant to winter for the plaintiff and not returned, for a set of ox harness borrowed and not returned, and for damages for the detention of the cattle. Counterclaim by defendant for balance of an account for hay.

H. C. Lisle, Lloydminster, for plaintiff.

E. R. Earle, Battleford, for defendant.

LAMONT, J.:—In the autumn of 1906 the defendant agreed with the plaintiff to winter 4 head of cattle for him for $19. The plaintiff says it was a term of the contract that the defendant was to take the cattle from the plaintiff's place, and return them in the spring. The defendant says that nothing whatever was said about his having to redeliver the cattle in the spring. In corroboration of the plaintiff's version are submitted two letters written by the plaintiff to the defendant. The first is dated 2nd April, 1907, in which he asks the defendant to send in the cattle and deliver them to Mr. J. P. Lyle; and the second is dated 3rd July, 1907, in which the plaintiff says: "Had they (the cattle) been returned, as they should have been, at the end of winter, I should have sold at $250 for the oxen, and saved interest. I shall certainly look to you for compensation, and demand immediate return to Mr. Lyle." In his reply to this letter, on 9th July, 1907, the defendant says: "Your cattle will stay on my place until you remit the $19 for their winter's keep, as you cannot be relied on for payment."

The defendant does not deny that the cattle were to be redelivered by him, and I am of opinion that, had the bargain not been that the defendant was to redeliver the cattle, the natural answer to the plaintiff's letter would have been that there was no agreement by the defendant

to redeliver them. In addition to the corroboration of the plaintiff's version afforded by these letters, I find the defendant's testimony in reference to the counterclaim unreliable. I therefore accept the plaintiff's version of the agreement, and find that the defendant agreed to return the cattle to the plaintiff. As to the harness there is no dispute; the defendant admits borrowing it, and having it still in his possession.

As to the counterclaim for the balance due on the hay account, I find that the contract was made, not with the plaintiff, but with his wife; that the defendant refused to enter into any contract with the plaintiff, because he was not good pay; but that he put up the hay for Mrs. Still, and whatever balance is due is due not from the plaintiff but from Mrs. Still. There is no contention on the part of the plaintiff that the defendant has converted these cattle to his own use, or that the cattle are not now the plaintiff's cattle, but that the defendant has not returned them according to contract, which I find to have been the case.

The defendant will have 30 days in which to return the cattle and hand them over to the plaintiff; the plaintiff paying him the $19 for wintering. If the defendant neglects or fails to return the cattle and harness within the 30 days, there will be judgment for the plaintiff for $341, the value as claimed. As to damages for the detention of the cattle, I am of opinion that the plaintiff is not entitled, as he could have had the cattle at any time on sending for them and paying for the wintering, in which case the damages would be the cost of sending for the cattle.

There will, therefore, be judgment for the plaintiff for $341, unless the defendant returns the harness and cattle to the plaintiff within 30 days. The defendant will pay the plaintiff's costs.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 6TH, 1908.

TRIAL.

DELAGORGENDIERE v. ACASTER.

Bailment—Innkeeper—Lost Luggage—Liability—Authority of Clerk or Manager.

Action to recover the value of lost luggage.

J. A. Allen, Regina, for plaintiff.

C. E. D. Wood, Regina, for defendant.

WETMORE, C.J.:—On 25th June, 1905, the plaintiff arrived at Regina from Prince Albert, and went to the defendant's hotel there, where she had dinner. She was accompanied to the hotel from the station by Mr. Justice Prendergast, who carried her luggage for her to the hotel. There is a variance in this respect between the testimony of the plaintiff and Judge Prendergast; she says the luggage was carried there by employees of the hotel; Judge Prendergast testifies that he carried it there. I accept his testimony in this respect. It would also appear from her testimony that she remained at the hotel that night and left the next morning, because she said she had supper and breakfast at the hotel, and took her satchels downstairs in the morning and left them in the hall. Judge Prendergast, on the other hand, testifies in effect that the train going west on the main line of the railway on the night of their arrival was late, and when it came, later on, they went by that train. However, that is not very material. On leaving, the plaintiff and Judge Prendergast paid their bills, and, as they were leaving, Judge Prendergast made a motion to pick up the luggage of the plaintiff, which consisted of two small satchels, to carry them over to the train, the same way that he had brought them to the hotel. One Leduc, who was manager or general clerk of the hotel (it is not clear which), said to him, "Why do you take that over; I will have it sent over?" The Judge again motioned for the satchel, but Leduc insisted upon it being sent over, and, pointing to the porter, said, "He will take it and give it to you on the train," to which the Judge said, "All right, if he is following; I am going with Mrs. Delagorgendiere, and I will be at the steps of the Pullman and will wait for him there;" and the plaintiff and the Judge then proceeded towards the train. The Judge waited at the steps of the Pullman, but the porter did not turn up, and the train moved off without the plaintiff's luggage being received. There were several Pullmans attached to the train, and the Judge looked through them and in a general way over the train, but the plaintiff's luggage could not be found. It was lost, and she has never received it since.

This action is brought to recover the amount of the value of this luggage. Some letters were put in, subject to objection on the part of the defendant's counsel. One was what purported to be a telegram from the Lansdowne Hotel to Judge Prendergast; another was a letter purporting to

be from Leduc to Judge Prendergast, of 4th July, and another letter from "the Lansdowne Hotel, per G. A. L.," of 17th August, 1905. I think the telegram and letters were improperly received in evidence. Assuming Leduc to be the manager or general clerk of the hotel, and as such to have authority to send such telegram or write such letters, there is no testimony either that the telegram was sent or that the letters were written by him or by any person having authority to bind the defendant. I will, therefore, in deciding this case pay no attention whatever to these letters.

It was alloged that the defendant was the proprietor of this hotel. It was set up that there was no evidence to establish that fact. The statement of claim alleges that this hotel was kept by the defendant. This is not denied in the statement of defence, and therefore must be taken as proved under the provisions of the Judicature Ordinance.

The only question remaining is, what authority had Leduc to bind the defendant by giving the directions to the porter that he did? I am of opinion that Leduc, whether manager or general clerk, would have authority to give directions to an employee of the hotel respecting the convenience or accommodation of guests about departing from the hotel, and that the directions that he so gave to the porter were of this character. I do not hold that this satchel was lost under circumstances which would render the defendant liable under the law affecting the responsibility of a landlord of a hotel to a guest. I express no opinion with respect to that. But I hold that Leduc's statements and directions and the fact that the plaintiff and Judge Prendergast left the hotel leaving this luggage in the care of the employees of the hotel, created a bailment, and that they not having done with the luggage what was promised, and the luggage for that reason having been lost, the defendant is liable.

Two satchels were lost. The statement of claim, however, only claims damages for the loss of one of them. One of them was a small satchel and contained only a few things of not very great value. I called upon the plaintiff's counsel at the trial to elect with respect to which satchel he would seek to recover, and he elected to go for the larger satchel. The contents of this satchel were sworn at the trial to be worth $142. I am not satisfied that they are worth that; but the full amount of damages claimed by the statement of

claim is only $100. I am satisfied that the satchel in question and contents were easily worth $100. There will, therefore, be judgment for the plaintiff for $100 and costs.

The sum of $40 was paid into Court on the alternative statement of defence. That amount will be paid out to the plaintiff on account of her judgment, and she will have execution for the balance.

SASKATCHEWAN.

NEWLANDS, J. JANUARY 9TH, 1908.

TRIAL.

PATRICK v. PATRICK.

Husband and Wife — Alimony — Wife Leaving Husband—Justification—Cruelty—Evidence to Establish—Counter-charge against Wife—Acts of Cruelty Due to Illness.

Action for alimony.

C. P. Fullerton, Winnipeg, and J. H. Parker, for the plaintiff.

J. A. M. Patrick, Yorkton, for the defendant.

NEWLANDS, J.:—This Court has jurisdiction to grant alimony: (1) to any wife who would be entitled to alimony by the law of England; (2) to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto; (3) to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

A dissolution of marriage may be obtained on the petition of the wife where her husband has been guilty of incestuous adultery, of bigamy with adultery, of rape, of sodomy, of bestiality, or of adultery coupled with such cruelty as, without adultery, would have entitled her in the Ecclesiastical Courts to a divorce a mensa et thoro, or of adultery coupled with desertion without reasonable excuse for two years or upwards, and to restitution of conjugal

rights on the ground that her husband has withdrawn from cohabitation without lawful excuse.

As there is no evidence in this case which would entitle the plaintiff to a dissolution of marriage in England, I need only consider whether the evidence given would entitle her to a judicial separation or a decree for restitution of conjugal rights.

The plaintiff in her statement of claim charges the defendant with striking her on numerous occasions and using blasphemous language toward her on two occasions, discolouring her face and body and rendering her ill for some time. These charges are admitted by the defendant, though he denies that his acts caused discolouration of the body or rendered her ill. I am, however, of the opinion that she has proved these charges. The definition of legal cruelty which was adopted by the majority of the House of Lords in Russell v. Russell, [1897] A. C. 395, is that there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it. The plaintiff has proved such cruelty in this case, and she would, therefore, be entitled to a judicial separation unless she has herself been guilty of a matrimonial offence. The defendant in his statement of defence charges her with several acts of cruelty towards him, none of which come within the above definition excepting paragraph (b) of 10, "Since the year 1900 the plaintiff has deliberately, on three occasions, thrown a burning lamp at the defendant to his great danger, and has thrown dirty water and other filth at him to his great annoyance, fear, and contempt of said defendant," and possibly paragraph (e) of 10, "In the month of October, 1906, the plaintiff for several nights and to the great discomfort of the defendant kept him awake by punching the defendant with a broom and sticking into his body pins for the purpose of annoying him, and through her ill-temper." The plaintiff admitted having thrown a lamp at defendant, and, as this would be legal cruelty and a matrimonial offence, it would prevent her from obtaining a judicial separation if it were not for some facts which came out in the evidence which I will refer to later on.

These acts of plaintiff which come under the definition of legal cruelty and the other facts charged by defendant and admitted by plaintiff, which, although not legal cruelty, would, under the decision of the Court of Appeal in Rus-

sell v. Russell, [1895] P. 315, justify defendant in leaving her, would also prevent her from obtaining a decree for restitution of conjugal rights if it were not for the circumstances which I will now mention.

The defendant in his evidence stated that it was only during periods of menstruation that the plaintiff acted towards him in the manner and did the acts of cruelty complained of in his statement of defence, and at all other times he said she was a good and loving wife; and Dr. Henry, one of the witnesses called by the defence, stated that her actions on those occasions may have been caused by her state of health, and in that case she would not be responsible for them. This evidence puts an entirely different appearance on the acts of cruelty charged against the plaintiff. If they were caused by her state of health, and she were not responsible for them, then they would not in any way justify the defendant in being cruel to her or in deserting her; rather they should have caused him to take more care of her than at any other time, and instead of deserting her to have attended to her as an invalid unable to care for herself; and under the view I have taken of this evidence, her actions at such times could not be classed under matrimonial offences, and she would, therefore, be entitled either to a judicial separation or to a decree for the restitution of conjugal rights.

But, even if this were not the case, and I would have to find that there was cruelty on the part of the wife, the Court has still power to give alimony. In Gooden v. Gooden, [1892] P. 1, Kay, L.J., in delivering judgment, said: "The question upon this appeal is as to the jurisdiction of the Divorce Court to grant permanent alimony to the wife after a decree for judicial separation, on account of the cruelty of the wife. . . . On the whole, we see no reason to doubt that the Ecclesiastical Court has jurisdiction to grant permanent alimony in a case like the present, and we cannot construe the recent Divorce Court Act as depriving the Divorce Court of a like jurisdiction. Our opinion, therefore, is that the Divorce Court has jurisdiction in this case to grant permanent alimony if it shall seem fit to do so.

For the reasons I have given, I think this case is one in which alimony should be granted, and I refer the same to the local registrar at Yorkton to fix the amount.

The defendant will pay the plaintiff's costs.

SASKATCHEWAN.

LAMONT, J. JANUARY 11TH, 1908.

CHAMBERS.

WESTAWAY v. HAMER.

Judgment—Default Judgment—Application to Set aside—Infant Defendant—Procedure—Rule 88—Failure to Follow—Setting aside Judgment—Costs.

Application on behalf of the defendant to set aside a judgment entered against him in default of appearance to the writ of summons served on him in this action, and also to set aside a garnishee summons issued after judgment.

The grounds upon which the application was based were: (1) that the defendant had directed the dispute note on which he had stated his grounds for disputing the plaintiffs' claim to be mailed to the clerk of the Court at Battleford, from whose office the writ had issued; (2) that the defendant was an infant; (3) that he had a good defence to the action on the merits.

T. S. McMorran, Regina, for defendant.

W. M. Martin, Regina, for plaintiffs.

LAMONT, J.:—In support of the application were read two affidavits, one of the defendant, in which he swore that he had not received the goods for the price of which he was sued; that he was under 21 years of age; and that on being served with the writ of summons, he filled out the dispute note with his grounds for resisting the plaintiffs' claim, and caused the same to be mailed to the clerk of the Court. The other affidavit was by the defendant's mother, in which she swore that the defendant was under 21 years of age; that the account sued for was for groceries supplied to her husband and used in his household; and that she had taken the dispute note and handed it to her son George (not the defendant) to be mailed, and that he had mailed it.

In opposition to the application was read the affidavit of the manager of the plaintiffs, in which he swore that the defendant personally had ordered the goods, and had personally received some of them, and that he had directed the

balance to be delivered to his brother, which was done; and that he did not know the defendant was an infant. These affidavits establish the facts that the defendant took certain steps to file a dispute note in answer to the claim, although no dispute note was received by the clerk of the Court; that the defendant was an infant, but that the plaintiffs had no knowledge of the fact that he was under 21 years of age.

Rule 88 of the Rules of Court directs the course required to be followed by the plaintiff where the defendant is an infant and has not appeared to the writ of summons. That Rule is as follows: "Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff shall, before further proceeding with the action against the defendant, apply to the Court or a Judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action; but no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least 6 clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or Judge, at the time of hearing such application, shall dispense with such last mentioned service." The language of the above Rule leaves no doubt as to its peremptory character. If the defendant is an infant, the procedure laid down in the Rule must be followed. In the case of Leaver v. Torres, 43 Sol. J. 778, an application was made to set aside a judgment entered on default of appearance against a person of unsound mind not so found by inquisition, under an English Rule which is identical with our Rule 88. In this case it was strongly contended that the Rule applied only where the defendant was of unsound mind to the knowledge of the plaintiff at the time the contract was entered into. Darling, J., however, in setting aside the judgment, said: "The Rule is quite clear that when the de-

fendant was of unsound mind the plaintiff must take the step of getting a guardian appointed, whether the unsoundness of mind was to his knowledge or not. The fact that the same rule applied to an infant shewed that the Rule was for the protection of the defendant."

The judgment entered against the defendant will therefore be set aside, and he will be allowed 14 days in which to file a dispute note.

As far as the garnishee proceedings are concerned, the application will fail; the money paid into Court by the garnishees will remain there to abide the issue.

As the application has partly succeeded and partly failed, there will be no costs of the application.

SASKATCHEWAN.

LAMONT, J. JANUARY 14TH, 1908.

TRIAL.

LITCHFIELD v. SASKATCHEWAN AND BATTLE RIVER LAND AND DEVELOPMENT CO.

Vendor and Purchaser—Sale of Land by Company—Agreement of Managing Director to Repurchase at Specified Price—Inducement to Purchase—Principal and Agent—Undisclosed Principal—Personal Liability of Agent—Specific Performance.

Action to compel specific performance by defendants of an agreement made on 18th April, 1907, between the plaintiffs and the defendant Norton.

A. M. Panton, for plaintiffs.

D. Keith, for defendants.

LAMONT, J.:—The defendants the Saskatchewan and Battle River Land and Development Co. Limited are a land company, with their head office at the town of North Battleford. The defendant Norton, now president of that company, was at the time the agreement was entered into,

their managing director. On 18th April, 1907, the plaintiffs called at the office of the company at North Battleford for the purpose of purchasing certain properties in that town; after some conversation between them and the defendant Norton, he offered the plaintiffs lot 7 in block 11 in North Battleford for $1,450, payable as follows: $665 cash; $485 on 11th September, 1907; and the balance of $300 on 11th March, 1908. They objected to buying such an expensive lot, as they had only money enough for the first payment, and could not undertake the others. Norton assured them he could sell the property for them before the next payment came due. The plaintiffs would not agree to buy the lot unless this agreement on Norton's part was in writing as part of the contract. Norton told them it would mutilate the contract to write it in; that he would give it on a separate piece of paper, which would be just the same. He then took their application for the lot. The application and agreement are as follows:—

"C.2.

"APPLICATION TO PURCHASE TOWN LOTS.

"The Saskatchewan and Battle River Land and Development Co. Ltd.

"North Battleford, Sask.

"North Battleford, Apr. 18th, 1907.

"Dear Sirs,—I hereby agree to purchase lot 7 in block 11 in the town of North Battleford for the price of $1,450. I enclose herewith first instalment of $665 of the purchase money. Balance is to be payable in .... equal instalments in ..... and ..... months respectively, from the date hereof, with interest at 8 per cent. per annum from date; and I hereby agree to purchase the said lot on the terms stated and to pay the taxes for the current year.

"Cash	$665
"Sep. 11, '07	485
"Mar. 11, '07	300
	$1,450

"If prior to the receipt of this remittance, the lot has been purchased by another person, or anything has occurred

to affect the price, advise me of the fact, and in the meantime hold the amount to my credit pending my further instructions.

"Yours truly,

"William Thomas Litchfield,
"Applicant.

"John Neilson. Occupation.

"North Battleford post office.

"Remittance:

"Draft, cheque $665
"Currency ....

"Total $665

"On all cheques and drafts not payable at par in North Battleford one quarter per cent. must be added for collection.—Agent—J. W. Norton."

The agreement to re-sell, signed by Norton, is as follows:

"J. T. Simpson, President. W. R. Sparling, M.D., Vice-president. W. H. Brown, M.D., Sec-treas.

"The Saskatchewan and Battle River Land and Development Co. Ltd.,

"N. Battleford, Sask., 19..

"Lot 7, block 11—$1,450.
"$665 cash.

"I will sell this lot for $1,800, in 4 months, or will take it back for $1,600, paying you your cash payment and profit in cash. J. W. Norton."

I find that this agreement to take the lot back at $1,600 in cash if it was not sold in 4 months, was a consideration inducing the plaintiffs to purchase the lot, and without such inducement they would not have purchased it.

The application was to the defendant company. The defendant company did not own the lot, to the knowledge of the defendant Norton, as he had sold it on behalf of the company to Messrs. McDonald and McLeod, and had again sold it on their behalf to one Thompson. The plain-

tiffs, on the execution of the agreement, paid with their application the sum of $665. At the expiration of the 4 months they applied to Norton to take back the lot as agreed, and pay them the money they had advanced and their profit. This Norton has not done, and the plaintiffs have brought this action to compel him to carry out his undertaking.

I find that throughout the entire transaction, the plaintiffs believed that they were dealing with the defendant company.

In Halsbury's Laws of England, vol. 1, p. 219, the law governing the rights of parties dealing with the agent of an undisclosed principal is laid down as follows: "Every person who, in making a contract, discloses the existence but not the name of the principal on whose behalf he is acting, is personally liable on the contract to the other contracting party, unless a contrary intention appears." Here, so far from a contrary intention appearing, his liability is fixed by his own signature. That liability is measured by the terms of his agreement, which was to sell the lot for $1,800 in 4 months or take it back for $1,600, paying plaintiffs the $665 they had paid, and also the difference between the price at which they bought and the $1,600, which was $150. That is, he agreed to pay them $815 and take the lot off their hands and thus free them from any further liability in reference to it. So far, therefore, as the defendant Norton is concerned, there will be judgment against him for $815 and costs.

As to the defendant company, they appear to have had nothing to do with the transaction, nor to have known anything about it. The agreement to take the lot back at $1,600 is not signed by the company nor in their name. It is signed with the name of the defendant Norton, and the plaintiffs must be considered as relying upon Norton to take back the lot, and not on the company. The action will, therefore, be dismissed against the company, but without costs, as their managing director led the plaintiffs to believe that they were dealing with the company.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 14TH, 1908.

TRIAL.

MATHIESON v. MURPHY.

Principal and Agent—Agent's Commission on Sale of Goods —Territory—Assistance of Principal in Making Sales—Contract—Evidence—Counterclaim—Negligence of Agent —Injury to Goods—Burden of Proof—Act of God.

Action to recover commission on the sales of organs and pianos alleged to have been made by the plaintiffs for the defendants.

J. F. L. Embury, Regina, for plaintiffs.

W. S. Ball, Regina, for defendants.

WETMORE, C.J.:—The fact of the plaintiffs having made sales of the character mentioned for the defendants upon commission is not denied; but it is alleged that some of the instruments were not sold under the arrangement whereby commission was agreed for, and that with respect to others the commission charged is too much. The latter question turns upon the terms of the agreement between the parties. The plaintiffs allege that they were to have 20 per cent. on the price of organs and 10 per cent. on the price of pianos sold, and that it was agreed that the plaintiffs were to be allowed assistance from the defendants in making or concluding their sales, and where such assistance was rendered there was to be no reduction in the amount of commission allowed. The defendants, however, allege that where the plaintiffs made a sale without assistance from them, they were to be allowed commission as hereinbefore stated, but where assistance was rendered by the defendants in making such sales they were to be allowed as commission only one-half the amount arranged for, namely, 10 per cent. on organs and 5 per cent. on pianos. The plaintiffs also set up that they had a district assigned to them, which they called the Lumsden district, and that they were entitled to recover commission on all sales made within such district, whether made by themselves or not.

I am of opinion that there was not any such agreement. No district whatever was assigned to the plaintiffs, and the idea that the Lumsden district was assigned to them only arose because they had been employed by the McCormick Company and other implement dealers, and under such employment had been in the habit of making their efforts in what they considered to be the Lumsden district, and they came to the conclusion in their own minds that the defendants had given them the exclusive right to operate in that district. I cannot find under the testimony that any exclusive right of the sort was given them.

With respect to the agreement for commission: I have come to the conclusion, after very lengthy consideration, that the defendants' version of the agreement for commission is correct. It is a remarkable fact that the plaintiffs in giving testimony as to this agreement for the full commission extending to every sale, no matter whether they received assistance from the defendants or not, waited for it to be brought out either by cross-examination or leading questions from their own counsel. This crucial circumstance in the case never seemed to have occurred to them until it was suggested by somebody else. Consequently I have come to look upon the testimony with very great suspicion.

The defendants, on the other hand, seemed to assert, or did assert, that if their manager or one of his men had anything to do with matters connected with the sale at all, the plaintiffs would only be entitled to half commission; for instance, suppose the plaintiffs made the agreement, and nothing was left to be done but deliver the instrument, and the defendants' manager or his man took the instrument to the buyer's place and left it there, and took a note, that that was assistance of a character which would defeat the plaintiffs' right to full commission. When I consider that the plaintiffs were not continually stocked with the instruments, that where they made a sale they would have in many instances to communicate with headquarters, at Regina, before the instruments would be forwarded from there, and that it was very frequently forwarded over the trails, and an employee of the defendants would necessarily have to take it out, I am of opinion that that was not assistance of a character which would deprive the plaintiffs of full commission. The sales to James Wilkie, Charles Wallace,

John Spier, and Malcolm McLellan, were of that character, and in those cases I am of opinion that the plaintiffs are entitled to recover full commission; and the right to full commission is admitted in the case of the sale to Quentin Pettigrew.

I am of opinion, however, that the plaintiffs are only entitled to half of the commission on the sales to Thomas Burrow, Thomas West, and William Canning, and on the sales of the pianos to Archie Morton and James Watson. It was contended in the case of West that the sale was effected by the defendants' man alone. I am of opinion that the sale was brought about through the sale of that same instrument in the first instance to Thomas West; it is true it was turned over to West's niece, but the sale was brought about by the instrumentality of the plaintiffs.

In the matter of Albert Maxin, I am of opinion that the plaintiffs are not entitled to any commission at all. I find that that was merely an exchange of a piano sold by the defendants to Maxin at a previous date, the exchange having been contemplated at the time the sale of the first organ was made.

I am also of opinion that they are not entitled to recover in the case of the sale to Malcolm Wilkie. That sale was effected by an employee of the defendants without any assistance on the part of the plaintiffs at all.

I will therefore allow commission in the following cases.

Organs.

James Wilkie, $165 at 20 per cent.	$33 00
Quentin Pettigrew, $150 at 20 per cent.	30 00
Charles Wallace, $150 at 20 per cent.	30 00
Thomas Burrow, $150 at 10 per cent.	15 00
Thomas West, $100 at 10 per cent.	10 00
John Spier, $150 at 20 per cent.	30 00
Malcolm McClellan, $160 at 20 per cent.	32 00
William Canning, $150 at 10 per cent.	15 00

Pianos.

Archie Morton, $400 at 5 per cent.	20 00
James Watson, $365 at 5 per cent.	18 25
Add commission agreed upon on the sale to the town hall at Lumsden	25 00
	$258 25

There will therefore be judgment for the plaintiffs on the claim for $258.25 and costs.

The defendants counterclaimed for damage done to a piano and two organs by the plaintiffs. The facts are that these instruments were at Lumsden under the custody or control of the plaintiffs. (The plaintiffs contend that one of the organs and the piano were not under their control, but I find against them in this respect.) A very unexpected and disastrous flood came down the river on the town of Lumsden, where these instruments were stored, to a depth of several feet; these instruments were caught in the flood and damaged, and this is the damage complained of. I am unable to find any evidence which establishes that the damage done was attributable to any negligence on the part of the plaintiffs with respect to these instruments. The flood was clearly the act of God, for which they were not responsible, and they did not hold them in any capacity which renders them liable as insurers. The onus of proving negligence was on the defendants. The mere fact that the articles were damaged does not prove negligence. The inference is that the instruments were in the water during the whole continuance of the flood, which lasted about two weeks. To instruments of that sort it would seem to me that one day's submersion might be as damaging as two weeks or more. There is no evidence that the plaintiffs were wanting in any effort to remove them out of the water; the fact is the evidence rather points in the direction that it was not possible to remove them.

Judgment for the plaintiffs on the counterclaim for costs.

SASKATCHEWAN.

LAMONT, J. JANUARY 14TH. 1908.

TRIAL.

MINIOTA LUMBER AND GRAIN CO. v. FOLEY.

Sale of Goods—Action for Price—Goods to Supply Place of Others Alleged to be Found Defective—Burden of Proof —Evidence—Neglect to Follow Directions for Using.

Action for the price of 21 squares of three-ply roofing, a small quantity of tar, and the weighing of certain loads.

The defendants at the trial admitted their liability for the last two items, and also admitted receiving the roofing mentioned in the first item, but alleged that the roofing supplied was delivered to replace a similar quantity of two-ply roofing, which the plaintiffs had previously supplied for the defendants' building and which had proved to be unsatisfactory.

C. E. Keith, North Battleford, for plaintiffs.

A. M. Panton, North Battleford, for defendants.

LAMONT, J.:—The evidence shews that in March, 1906, the defendant Foley took a list of certain materials required for their building to the plaintiffs and also to the Independent Lumber Company, and asked for an estimate of the cost; the plaintiffs furnished an estimate, which was accepted by the defendants. Among other materials in the list, was an item for "two-ply roofing." The plaintiffs in furnishing their estimate quoted a price on "black diamond roofing, two-ply," and this roofing, along with other materials, was ordered by the defendants from the plaintiffs. The roofing was delivered, and the defendants' foreman put the same on the defendants' building. Several heavy rain storms came shortly afterwards, and the roof would not keep out the rain, and for the purpose of a roof was practically useless to the defendants, who called in an employee of the plaintiffs to see it. It was found on examining the roof that no coating of tar and sand had been put on the roof after laying it. This, it is contended by the plaintiffs, is part of the roof, and is required on all black diamond roofing, and they contend that the rain finding its way through the roof was not due to any defect in the material supplied, but was solely due to the failure of the defendants to coat over the felt, when they put it on, with tar or a preparation of tar known as "Barrett's roof coating," which the manufacturers furnish for the purpose and for which no charge is made; and as proof of this contention they point to a roof on one of their own buildings made of black diamond roofing, two-ply, coated over with tar and sand, and which was admitted by the defendants themselves to be a first class roof. The defendants' foreman, who laid the roof, and who was familiar with felt roofing, admitted that he had never laid any black diamond roofing before, and that he did not know that it re-

quired a coating of tar and sand over it. The defendants stated that none of the employees of the plaintiffs informed them that the roofing required any coating over it to make it complete. The evidence, however, shewed that each roll of paper contained directions headed "coating," and the first two paragraphs of the directions read as follows: "Do not endeavour to cheapen the cost of black diamond roofing by not coating it twice with Barrett's roof coating, as directed. A protective surface is absolutely necessary to insure the life of any roofing, and experience has proven that two coats are worth more than can possibly be saved by slighting this item. When black diamond is first applied, it should immediately be given the first coating, unless felt has been wet, in which case it is best to wait until it dries. This first coat should be thoroughly brushed into the felt and given time to dry. One to two weeks later, depending on weather conditions, apply second coat. This should be evenly spread, and sharp clean sand sprinkled therein as applied, and before coating has had time to dry. Spread on all the sand it will hold. These two coats will require about two gallons per 100 square feet of surface."

The foreman who had charge of laying the roof for the defendants, on being asked if he had read the directions, said he had not, that he considered he knew how to lay a roof without reading directions; and it was contended by counsel on the argument that the fact that the defendants' foreman had not read or followed the directions, when he was not familiar with this class of roofing, did not constitute negligence on his part. I cannot accept this view. I find that the "two-ply black diamond" roofing on the plaintiffs' shed is a good roof, and I am of opinion that had the defendants given their roof two coatings of tar and sand, as required by the directions, the roof would have been satisfactory, and the failure of the defendants' foreman to do this resulted in the roof leaking, and it finally becoming useless as a roof, and rendered the new roof necessary. There was no legal obligation cast upon the plaintiffs by reason of the estimate they furnished, as to the cost or the acceptance of the estimate, to see that the roof was properly laid. Nor did they become liable, as contended by the defendants, from the fact that they delivered a portion of the material, because the evidence, which on that

point was uncontradicted, shews that they were under no obligation to deliver, but did so because it was their custom, and the tar, nails, claps, and cement provided for the roof were not delivered by the plaintiffs, but obtained by the defendants' foreman.

I am, therefore, of opinion that the defendants have failed to shew any facts which would entitle them to be freed from the obligation to pay for the roofing set out in the statement of claim, and which they admittedly received.

There will be judgment for the plaintiffs for $100.70 and costs.

SASKATCHEWAN.

LAMONT, J. JANUARY 16TH, 1908.

TRIAL.

GRIMES v. GAUTHIER.

Chattel Mortgage—Default in Payment—Seizure of Chattels —Collusive Sale—Damages—Interest.

The plaintiff sued the defendant for wrongfully selling certain chattels seized by the defendant under a chattel mortgage, without notice, and for a nominal price, and not for the best price which could have been obtained for the same.

C. E. Keith, North Battleford, for plaintiff.

A. M. Panton, North Battleford, for defendant.

LAMONT, J.:—On 15th October, 1906, the defendant sold to the plaintiff one pair of oxen, one set of harness, and a waggon, for the sum of $250. The plaintiff paid $125 at the time of sale, and gave a chattel mortgage on the chattels for the balance of the purchase money, payable, $12 on the 15th days of January, April, and July, and $26.50 on the 15th day of October, in the years 1907 and 1908. On 15th January, 1907, the first instalment of $12 became due and payable, and was not paid, and on 23rd January the defendant seized the oxen, harness, and wag-

gon. On the same day he gave the plaintiff a notice that he would return to him the property seized, on payment of $146 and the cost of caring for and feeding the oxen, within 15 days. No statement was given as to how the additional $21 was made up. The mortgage contained the usual clause providing that in case of default being made in any payment, the whole amount secured by the mortgage should become due and payable, and the mortgagee might take possession of the chattels mortgaged and sell the same either at public auction or private sale. After seizing the chattels, the defendant took them to the farm of his father, Fred. Gauthier, who assisted him to make the seizure. The plaintiff did not redeem them within the 15 days. On 9th February, 1907, one Sidney J. Morris went to Fred. Gauthier, the father, for the purpose of purchasing the oxen. Fred. Gauthier said he did not own them, but they belonged to his son Leonard Gauthier, but to come back next day. On returning the next day Mr. Morris found that the oxen then belonged to Fred. Gauthier, and he arranged a deal with him by which he traded Gauthier a mare valued at $100 and $30 cash for the oxen. Mr. Morris valued the oxen the day he received them at $140. The defendant on 9th or 10th February sold the whole of the chattels seized to his father for $110, by private sale, without notice to the mortgagor or the public. The sale was made after the conversation between the father and Morris. The reason for making the sale to the father, as sworn to both by the defendant and his father, was that the defendant was worrying over the matter, and the father took them off the son's hands to save him from worrying. The value of the chattels when he took them over was placed by Fred. Gauthier as follows: oxen and harness, $50; waggon, $60. He testified that the oxen were not worth $25 at the time he took them over, but he allowed $50 for them. He also testified that the mare he got from Morris in exchange for the oxen was practically of no value. The value of the chattels disposed of was placed by Morris, who purchased the oxen, as follows: oxen and harness $140, and waggon $75. Another witness, H. C. Beet, placed the oxen at $160 and waggon at $85, but could not place a value on the harness. The plaintiff valued them at the price paid for them, namely, $250. The defendant and his father thought $110 a high price. I find that the oxen and harness at the time of the sale were worth $150.

As to the waggon, the defendant admitted paying $98 for the waggon a short time before he sold it, and I find at a fair valuation it was worth $85. The total value, therefore, of the chattels was $235.

There are one or two circumstances casting a suspicion on the defendant's bona fides, which were not satisfactorily explained at the trial. In his statement of defence the defendant alleges (par. 4), that he sold the chattels pursuant to his rights under the mortgage, "but did not realize the amount of the plaintiff's indebtedness to him, but only received the amount of $70 in respect of the indebtedness of $125, and was put to damage and expense in the sale thereof, to wit, $10;" and by the following paragraph he counterclaims for the sum of $65 still claimed to be due under the mortgage, while at the trial he swore that he received $110. The expenses of the sale, which in his statement of defence he put at $10, can only mean the expense of seizure and the keep of the animals; there was no other expense; yet in his notice to the plaintiff of 23rd January he demands $146, being the balance of $125 due on the mortgage, and $21, presumably expenses. No other explanation was given.

A large amount of evidence was given as to the condition the oxen were in, as to how they were being cared for, and the ability of the plaintiff to properly care for them, and it was contended that it was necessary for the defendant to take possession of them to protect his security, as the plaintiff was out of feed.

As far as the seizure is concerned, I am of opinion that, as the plaintiff made default in the payment of $12 due 15th January, the defendant was within his legal rights in taking possession of the chattels. Having taken possession, however, was the sale of the property made by him to his father such a sale as a mortgagee in possession is entitled by law to make? The principle of law governing the rights and obligations of a mortgagee in possession was laid down by the Supreme Court of Canada in the case of Rennie v. Block, 26 S. C. R. 356, where it was held that a chattel mortgagee in possession, who sold the mortgaged goods in a reckless and improvident manner, was liable to account to the mortgagor, not only for what he actually

received, but what he might have obtained for the goods had he acted with proper regard for the interests of the mortgagor, whose trustee he was so far as the equity of redemption was concerned.

The same principle is laid down in Barron & O'Brien's work on Chattel Mortgages and Bills of Sale, 1897 ed., at p. 77, in the following words: "Having obtained possession, a mortgagee must exercise proper care and discretion and adopt such means as would be adopted by a prudent man to get the best price that can be obtained. He must use every exertion to sell the property at the best price."

Was the conduct of the defendant within the principle here laid down? Did he exercise proper care and discretion and use such means as would secure the highest price for the chattels he had taken in possession? It is very clear to my mind that he did not. The sale which he purported to make to his father cannot really be called a sale at all. It was merely a collusive arrangement by which an unconscionable advantage was to be taken of the plaintiff. In no particular whatever were the interests of the plaintiff safeguarded, and, in my opinion, he is entitled to recover.

The next question is: what is the measure of damages to which the plaintiff is entitled? In the case of National Bank of Australia v. United Hand in Hand and Band of Hope Co., 4 App. Cas. 413, the Judicial Committee of the Privy Council held that a mortgagee was chargeable with the full value of the mortgaged property sold if from want of due care and diligence it had been sold for a sum less than might have been received for it. This amount the defendant should have received for them, and is therefore accountable for it. Deducting the balance due on the mortgage, $125, he must be considered as holding the sum of $100 as trustee for the plaintiff. On this amount the plaintiff is entitled to interest at the legal rate: Ely v. Read. 76 L. T. R. 29; Lewin on Trusts, 11th ed., p. 207.

There will be judgment for the plaintiff for $110 and interest thereon from 10th February, 1906. The defendant will pay the plaintiff's costs.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 16TH, 1908.

CHAMBERS.

HUGGARD v. ONTARIO AND SASKATCHEWAN LAND CORPORATION.

Payment out of Court—Money Paid in by Defendants to Represent Subject Matter of Action—Plaintiff Unsuccessful at Trial—Appeal—Retention of Money in Court pending Appeal—Insolvency of Defendants.

Application by defendant company for an order directing that the moneys paid into Court to the credit of this cause be paid out to them.

W. M. Martin, Regina, for defendants.

T. S. McMorran, Regina, for plaintiffs.

WETMORE, C.J.:—The moneys paid into Court amount to $35,000. The material used on the application is not of a very satisfactory character, inasmuch as there is nothing to point out what the nature of the action is. It is, however, so far as I can gather, an action affecting rights to a large quantity of land. An injunction order was obtained restraining the defendants from selling or in any way dealing with the lands in question, and a caveat and lis pendens were also registered against such lands. The defendant company having paid this sum of $35,000 into Court, my brother Newlands made an order cancelling the injunction order, and directing the registrar of land titles to cancel and remove from the records the caveat and lis pendens so registered. I have consulted my brother Newlands as to the purpose for which this $35,000 was paid into Court, and he tells me it was paid in to represent the corpus of the property in dispute, and the provision is such that if that $35,000 is taken out and distributed, the plaintiffs will have nothing to go against. The action came on for trial before the same Judge, who gave judgment for the defendants dismissing the action with costs. The plaintiffs have appealed, and the costs of the defendant company have been paid. The plaintiffs oppose this appli-

cation, on the ground that if this money is paid out, and they should succeed in the appeal, the object of paying the money in will be defeated, and they will be without remedy—if the money had not been paid in, the land would have been there. The affidavit of the defendant Correlli was read in which he states that in his opinion the defendant company are insolvent.

The general rule is that where a party to a suit has been successful, the Court will not stay execution, unless there is something to establish or render it probable that the party realizing the money under such execution would not be able to pay it back if he failed in the appeal. That appears to be what was laid down in Barker v. Lavery, 14 Q. B. D. 789, and followed in In re Lyle, 11 P. D. 114; but I think the last mentioned case went a little further than Barker v. Lavery. At any rate, Fry, L.J., at p. 116, was of opinion "that, in the absence of special circumstances, the application must be refused." I am of opinion that special circumstances have arisen here: first, in view of the object for which the money was paid into Court, and the result obtained by such payment into Court, which I have stated entirely deprived the plaintiffs of the corpus against which they proceeded and substituted another one; and next, in view of the affidavit of Mr. Correlli.

I will refuse this application, and the costs to either party will abide the event of the appeal.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 17TH, 1908.

DISTRICT COURT.

REX v. WILLIAMSON.

Criminal Law—Appeal from Order of Magistrate—Filing of Order Appealed against—Time—Condition Precedent—Criminal Code, sec. 757.

Appeal by one Harwood, the prosecutor, to a District Court from an order of the police magistrate for the city of Regina dismissing a complaint.

F. W. G. Haultain, K.C., for the prosecutor.

J. F. Frame, Regina, for the defendant.

WETMORE, C.J.:—The defendant was charged with a breach of a by-law of the city of Regina, and the charge was dismissed in a summary conviction proceeding before the police magistrate for the city. The prosecutor, Harwood, appealed to the District Court. The Court opened on 15th January, and the appeal was reached and called on the afternoon of the 16th. The magistrate's order that was appealed against was only filed with the clerk of the District Court on the 16th, a short time before the appeal was so called.

Paragraph 1 of sec. 757 of the Criminal Code (R. S. C. 1906) is as follows: "Every justice before whom any person is summarily tried, shall transmit the conviction or order to the Court to which the appeal is by this part given, in and for the district, county, or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the Court."

It was urged that the transmitting the conviction or order was a condition precedent or preliminary to the hearing of the appeal, and that it must be transmitted and lodged with the clerk before the sitting of the Court to which the appeal is taken. I am of opinion that it is requisite that the conviction or order appealed against should be filed in the Court before the appeal can be entertained, because otherwise there would be nothing to quash or amend if the Court came to the conclusion that the conviction or order should be quashed or amended, and I conceive that that was the object in enacting sec. 757 and the provisions of a similar character in preceding enactments. But, while I am of that opinion, I am also of opinion that sec. 757 is merely directory; that it is not a preliminary or condition precedent to the appeal, as are the requisites of sec. 750 of the Code, such as notice of appeal, the entering into a recognizance, or giving notice of grounds of appeal, which must be given at the time and in the manner as directed in that section; otherwise the Court or a Judge has no jurisdiction to entertain the appeal. The provisions in sec. 750 apply to each and every individual appeal, and must be complied with in each case in order to give the jurisdiction. The provisions of sec. 757 are general, and apply to every conviction or order made by a justice, whether there is an appeal or not. It is the

duty of the magistrate to comply with sec. 757, and he ought to have the document filed before the Court opens. I am not prepared to state what the consequences may be to him if he does not, but, as stated in my opinion, the provision is only directory; if it is in Court when the appeal is called on for hearing, I think it is sufficient for the purposes of the appeal.

I can find no case that holds that these papers should be filed before the Court opens. In Ex p. Cowan, 9 Can. Crim. Cas. 454, the conviction had not been sent forward to the Court of Appeal at all, and even there the certiorari did not go, so far as the judgment of the majority of the Court was concerned, because the magistrate's return was not made. McLeod, J., who delivered the judgment of the majority of the Court, states at p. 463: "It was contended on the argument that it (meaning the certiorari) would lie, because the magistrate had not made the return to the County Court on the appeal. For myself I would say that that would not be a sufficient ground, because I think he could be compelled to make the return." I express no opinion with respect to that; it is not necessary. It is enough for me to state that, if the order appealed against is filed before the case comes on for hearing, that is sufficient.

Since preparing the above judgment my attention has been called to In re Ryer, 46 U. C. R. 206, in which it was held that for the purposes of an appeal the conviction might be returned and proved at any time during the hearing of the appeal. Osler, J., is cited at p. 209 as follows: "There is nothing that I am aware of which makes it necessary that the formal conviction should have been returned and filed before the appeal is entered, or even before the hearing has commenced." It is not necessary for me to go as far as that learned Judge went. It is sufficient for the purposes of this case to hold as I have done, namely, that it is sufficient if the conviction is filed before the hearing is commenced. I have also had my attention called to Paley on Convictions, 7th ed., p. 305, in which it is stated: "If the conviction or order has not been returned to the sessions, a subpœna duces tecum should be served upon the clerk to the justices by whom it was made." If that is good law, the subpœna duces tecum should in this country be served upon the justices who made the conviction, as we have no clerks to justices.

SASKATCHEWAN.

LAMONT, J. JANUARY 18TH, 1908.

TRIAL.

GILBY v. JOHNSTON.

Weights and Measures—Threshers Lien Ordinance—Computation of Amount of Grain Threshed—Automatic Weigher—Evidence—Burden of Proof—Custom.

Action to recover $68.09 for 89 bushels of wheat alleged to have been wrongfully taken by defendant from plaintiff's granary.

E. W. F. Harris, Arcola, for plaintiff.

W. H. Williams, Carlyle, for defendant.

LAMONT, J.:—The plaintiff in this case sues the defendant for the value of 89 bushels of wheat, at 77⅞c. a bushel, or in all $68.09. He alleges that the defendant took 89 bushels of wheat from his granary without his authority and without his permission, and that he took it unlawfully. The defendant admits that he took the 89 bushels of wheat, but he says that he had a right to take it; that having threshed the plaintiff's grain he had a right to take the grain he did take by virtue of the Threshers Lien Ordinance.

As to most of the facts there is no great divergence of testimony. In the autumn of 1905 the plaintiff went to the defendant and asked him to thresh his grain. It was agreed between them that the plaintiff should pay him 7c. a bushel for the wheat and 6c. a bushel for the oats. As to the price there is no dispute between the parties, but there is a dispute between them as to the quantity of grain threshed. The defendant in his statement of defence contends that he threshed for the plaintiff 3,958 bushels of wheat and 1,948 bushels of oats. The plaintiff asserts that he only threshed for him 3,670 bushels of wheat and 1,686 bushels of oats, and that he paid the defendant in full for the threshing, except the sum of $13.06, which he admits was due to the defendant on account of the threshing at

the time he took the wheat. The defendant, asserting that he threshed a larger amount, claimed a balance at that time of some $48.95, and he took the wheat from the plaintiff's granary in payment thereof and sold it, and realized the amount of his claim and $2.24 more. The $2.24 difference between the proceeds of the sale of the wheat and the amount of his claim the defendant has paid into Court in this action. In so far as the facts are concerned, the one question that the Court has to determine is, what was the real amount of the grain threshed.. The defendant had attached to his machine a "perfection weigher and bagger." This is an attachment which automatically weighs the grain as it comes from the machine, and registers the quantity threshed. According to the register there was threshed 3,958 bushels of wheat and 1,948 bushels of oats. The plaintiff admitted that, generally speaking, it was customary to pay for threshing according to the quantity indicated by the automatic weigher. This establishes a prima facie case for the defendant, and the onus is on the plaintiff to shew that the registering of the amount by the machine is not correct. He seeks to do this, so far as the wheat is concerned, by filing as his evidence the receipts of the elevator company for the amount of wheat he took to the elevator, and adding to that the amount he kept at home and otherwise disposed of. He kept at home 185 bushels. This amount, together with the 89 bushels taken by the defendant, and the amount allowed by the elevator people, makes a total of 3,670 bushels. As to the oats, he seeks to displace the onus upon him by a measurement of the bulk of the oats in bins and a calculation made therefrom. The plaintiff complained during the threshing both to the defendant and the separator man about the weight he was receiving, and on one occasion, as the result of his complaint, the separator man, in the absence of the defendant, altered the weighing apparatus so as to be more favourable to the plaintiff; but he testifies that he did this not because he thought the weights were wrong, but because he did not want to have any trouble in the absence of the defendant. The defendant was present every day and kept constantly testing the weights and found them correct. The separator man also testified that the weigher was working satisfactorily. There was no evidence submitted beyond the complaint of the plaintiff that the weight of the grain was not being accur-

ately registered by the machine, and, in the face of the testimony of the defendant and separator man and the frequent tests made by the former, as well as the evidence of the neighbours for whom the defendant threshed, just before and after he threshed for the plaintiff, that the registering of the machine was accurate and satisfactory, I am obliged to hold that the plaintiff's evidence as to what took place at the threshing does not establish that the machine was giving short weight.

The other evidence upon which the plaintiff relies is that some time after the threshing he weighed or measured the grain and found the amount to be less than the amount registered by the machine.

With reference to the oats, I am asked to hold that the weight registered by the machine was wrong, because subsequent to the threshing the plaintiff caused the bins in which the oats then were to be measured and the contents to be calculated in bushels. To this was added the amount fed by himself, his boys, and hired help, an account of which was supposed to be kept. These amounts totalled only 1,686 bushels. The person who made the measurements and calculations for the plaintiff testified that in reducing the bulk to bushels he had allowed 41 lbs. to the bushel. He did this because having weighed several samples the samples weighed 41 lbs. to the bushel. The validity of the plaintiff's contention rests, therefore, upon the following assumptions: that a correct account was kept of all the oats used or fed; that there was no shrinkage or loss of weight; that the measurements and the calculations based thereon were all accurate; and lastly, that all the oats weighed 41 lbs. to the bushel. In my opinion, the assumption that all the oats would weigh 41 lbs. to the bushel, based only on two or three tests, is not sufficient to justify me in holding that the registered weight as given by the machine was not correct.

As to the wheat, the register on the machine shews that 3,958 bushels were threshed. The plaintiff endeavours to shew that this is not correct by filing as evidence the receipts from the elevators for the quantity of wheat he delivered at the elevators, and weighing the balance which he retained. These together amounted to 3,670 bushels. No evidence was put in to shew that the scales on the elevators were correct, or that the receipts filed by the plaintiff were

the correct weights of the wheat sold, or whether or not anything had been taken off for dockage.

To hold that the automatic register, though constantly tested, was not correctly weighing the wheat, I must find that all the wheat threshed was either weighed at home or taken to the elevator; that the weights allowed by the elevator people are correct; and that there has been no shrinkage or loss of weight through handling or otherwise. I do not think, on the evidence before me, I should be justified in coming to that conclusion. The onus is on the plaintiff, and on the evidence before me I must hold that he has not displaced that onus.

Apart, however, from these considerations, what are the legal rights of the parties where a farmer engages a thresher to thresh his grain at a certain price per bushel? In this case the defendant's machine was, to the knowledge of the plaintiff, fitted out with an automatic weigher, and he knew also that the defendant based his charge for threshing on the amount registered by the automatic weigher. Considerable evidence was given to shew that in certain cases these automatic weighers could not be wholly relied on, and that it was not always customary to accept the weights as registered by the machine. One of the witnesses testified that in his part of the country it was the custom for the farmers to keep a check on the accuracy of the machine, by frequently testing the weights during the threshing. Another testified that it was customary to accept the weights in case there was no dispute, but if there was any dispute the grain threshed was measured before the machine left the place, and it was the common understanding that the amount calculated by measurement should be accepted by both farmer and thresher, subject to these various understandings. The evidence shewed that the weights as registered by the machine formed the basis for computing the charge, and, this being so, I am of opinion that it makes out a prima facie case for the thresher. The contract between the parties is to thresh the grain at a certain price per bushel, and when a farmer hires a thresher there must be some understanding, either express or implied, as to how the amount shall be arrived at. When the machine has attached to it an automatic weigher, and the thresher fixes his amount according to the amount registered by it, to the knowledge of the farmer, there is an

implied contract to accept the weights registered by the machine, unless these weights are shewn to be clearly wrong. If there is a general custom established, or a general understanding that in case of dissatisfaction with the weight as registered by the machine, the farmer and thresher will measure up the bins at the close of the threshing and will both accept the amount calculated on such measurements, it is possible that this custom would prevail as against the implied contract to accept the weight furnished by the automatic weigher. But this consideration does not enter here. The plaintiff admits that the custom was to pay by the weight as registered by the machine. Neither were the bins measured at the close of the threshing. As I have said, the registering of the automatic weigher makes out a prima facie case for the defendant. The onus is on the plaintiff to shew that this is wrong, and on the evidence submitted before me I must hold that he has not displaced that onus. There will be judgment for the defendant.

As the defendant admits he has $2.24 belonging to the plaintiff, which is sufficient to carry costs up to the time he filed his dispute note, the plaintiff will be entitled to the costs of the proceedings up to the time the dispute note was filed. The costs of the subsequent proceedings will be to the defendant.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 20TH, 1908.

TRIAL.

MILESTONE LAND AND LOAN AGENCY CO. v. LUCKSINGER.

Principal and Agent—Agent's Commission on Sale of Goods —Agent Bringing Principal and Purchaser together—Sale on New Terms—Quantum Meruit.

Action to recover money for plaintiff's services in selling a threshing outfit for defendant as alleged.

J. A. Allan, Regina, for plaintiffs.

W. M. Kellock, Weyburn, for defendant.

WETMORE, C.J.:—The defendant was possessed of a threshing outfit which he authorized the plaintiffs to sell for him for the price of $2,000, and on the terms of $200 cash down and the balance in 4 years, payable on 1st December, 1907, 1908, 1909, 1910, with interest at 7 per cent., and for doing which he agreed to pay the plaintiffs a commission of $200. This arrangement was made in writing, and was dated 2nd May, 1907. The threshing outfit was at Weyburn. One John Leckivitz, through the instrumentality of the plaintiffs, went to Weyburn to look over defendant's outfits, with a view to purchasing one of them. It may be stated that at the same time that the defendant listed the outfit in question with the plaintiffs he also listed another threshing outfit with them for sale. Before Leckivitz went down to Weyburn to look over these outfits, the plaintiffs wrote the defendant on 1st July as follows:—

"In May when you were here you listed with us two threshing machines, and we wish to inform you that we have a prospective customer of the name of John Leckivitz. This man will likely look over your outfits within the next 2 or 3 weeks, and would like to know when it will be convenient to you to meet him at Weyburn. He is likely to go down about the morning of the 13th or the morning of the 20th."

To this the defendant replied on 2nd July:—

"Yours of the 1st to hand, and I note what you say about having a man for one of my rigs. Will say that I shall be in Milestone soon, and talk it over with you, and if possible take the party down to Weyburn to shew him the rigs."

On 12th July the defendant wired the plaintiffs by the name of the American Loan Agency as follows:—

"If your man will come to Weyburn to-morrow, wire me to-day."

And the plaintiffs sent the following answer:—

"Customer promised to leave for Weyburn Saturday evening the 13th."

That would be the next day. Accordingly, on 13th July Leckivitz went to Weyburn to look at the outfits, and it is quite clear that he did so through the instrumentality of the plaintiffs, or, more directly, of John H. Murphy, one of the plaintiffs. A sale was not effected, however, on that occasion, because Leckivitz considered the price too large.

On 22nd July the plaintiffs wrote the defendant as follows:—

"While we have received no word from you, we are pleased to learn that you have sold one of your threshing outfits through our advertising; we refer to the purchase through Mr. P. M. Martin, of this place. We regret that you did not close the deal with Mr. Leckivitz, as he has since looked round and inspected other rigs which were for sale. However, he has not bought, and if you do your part and see him soon again you will likely make this sale also. We would suggest that you arrange to come here and see the Leckivitz brothers, as they are likely to do busisness with some one before long."

The evidence is not clear as to when the defendant received this last mentioned letter, but he went to Leckivitz and concluded a bargain with the Leckivitz brothers — John Leckivitz and Frank Leckivitz—for the sale to them of the threshing outfit for $1,825. This bargain was made on 26th July, and $100 was paid by the cheque of John Leckivitz.

I am of the opinion, and find, that this letter of 22nd July was received in due course of mail before the defendant went to visit the Leckivitz brothers with a view to securing a sale of his outfit. The defendant asserts that he would not have sold to John Leckivitz at all because he did not consider him financially strong enough. I may say that I am by no means satisfied that this is the case. However, I do not consider it necessary to make an express finding upon the subject.

I find that the plaintiffs brought John Leckivitz and the defendant together, and that the sale eventually made to the Leckivitz brothers was the result of these parties being so brought together; and, moreover, that the visit of the defendant to the Leckivitz brothers and the sale of the outfit by him to them were brought about by means of the plaintiffs bringing John Leckivitz and the defendant together, followed up by the plaintiffs' letter of 26th July containing the suggestion that the defendant should arrange to come to Milestone and see the Leckivitz brothers. Consequently, the defendant has had the benefit of the plaintiffs' service in bringing this sale about.

Now, it is true that the plaintiffs did not sell or bring about the sale for the price and on the terms specified in the arrangement of 2nd May, and it is contended on the part of the defendant that, because they did not bring about a sale for such price and terms, the plaintiffs are not entitled to recover.

I cannot find a case exactly on all fours with this one except Wycott v. Campbell, 31 U. C. R. 584. In the

other cases which may possibly approach in principle to this one, the agreement for sale was for a percentage commission on the amount sold. It is true that although in some of these cases the amount for which the property was sold was less than it was listed for, the Courts held that the broker was entitled to the commission on the price it was sold for at the same percentage of commission, provided, of course, that the sale was brought about through the means of the broker. In this case, however, no percentage of commission was agreed upon. A lump sum was to be paid if the property was sold for a certain stated price and at stated terms. The circumstances in the case of Wycott v. Campbell seem to me to be the same in principle as those in this case. There the defendant agreed with the plaintiff that if he would find him a purchaser for his farm at $6,000 and got not less than $1,000 down, he would pay him $200. The plaintiff found a purchaser at $6,000, who paid only $500 down, but the defendant accepted and sold to him on these terms, and it was proved that after the sale the defendant promised the plaintiff to pay him the $200. The Judge of the County Court before whom the action was tried found for the plaintiff for $200 for his services. This judgment was appealed, and it was held by the appellate Court that the defendant having accepted and dealt with the purchaser found by the plaintiff, though not such a purchaser as the agreement called for, the plaintiff was entitled to recover for his services on the comman counts, and the Court also found that, as the defendant had promised to pay the $200, the verdict was right. Wilson, J., in delivering the judgment of the Court, at p. 590, says: "The plaintiff in this case did unquestionably find a purchaser for the defendant who would give, and did give, $6,000 for the farm, and he found such purchaser within 4 months from the time of the commission contract, but the purchaser was one who did not or could not pay $1,000, as had been stipulated for between the plaintiff and defendant, but $500 only. The defendant accepted the purchaser so found by the plaintiff at the $6,000, and he took from him the $500, instead of the $1,000. In such a case the plaintiff did not perform his contract so as to be entitled to the specific remuneration of $200. But the question is not so much whether he should get the $200, as whether he should get anything. The defendant contends that, although he received the benefit of the plaintiff's services to the full extent he had bargained for, excepting that he had got $500 less in cash on the first payment than

he desired, he is not bound to pay the plaintiff anything whatever, although he did, after the sale was made, promise repeatedly to pay him. In our opinion that is not the law. The general rule is that a person should be paid for his work. It is also as plain a rule that a person must perform his contract to enable him to get his payment. But it has long been settled that if a person do not literally perform his contract, the person for whom the work was done, or the service performed, though he may reject the work, service, or article, is bound to pay for it, if he accept of it, to the extent to which it is of any value to him, or to the amount of the perfect work or article, less the sum that may be required to complete it. The acceptance gives rise to a new contract, which is implied by law, and it is not a question for the jury."

I agree with what is so laid down, and I hold that the plaintiff is entitled to recover on the quantum meruit. The price agreed to be paid, if the sale had been made for $2,000, was equivalent to 10 per cent. commission, and I think that a fair amount to be allowed on the quantum meruit would be 10 per cent. upon what the outfit was actually sold for, viz., $1,825; that would be $182.50.

There will be judgment for the plaintiff for $182.50 and costs.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 21ST, 1908.

DISTRICT COURT.

REX v. WILLIAMSON.

REX v. FEIHNE.

Municipal Corporation—By-law—Assize of Bread—Prescribing Weight of Loaf—"Baker's Bread"—City of Regina—Powers Conferred on Town of Regina by Municipal Ordinance before Incorporation of City—Continuance of Powers—Unreasonable By-law—Specific Weight—Shrinkage—Exception in Statute—"Fancy Bread"—Onus.

Appeals by the prosecutor Harwood from orders of the police magistrate for the city of Regina dismissing complaints

against the defendants for selling bread weighing less than the assize of bakers' bread, contrary to by-law No. 102 of the city of Regina.

F. W. G. Haultain, K.C., for the prosecutor.

J. F. Frame, Regina, for defendant Williamson.

Doerr, Regina, for defendant Feihne.

WETMORE, C.J.: — Several objections are taken to the validity of the by-law. It was passed on 26th March, 1891, when Regina was a town and under the provisions of the Municipal Ordinance, R. O. 1888. The provisions in that Ordinance respecting the power to make by-laws with regard to the assize of bread were the same as those in clause 36 of sec. 95, ch. 70 of the Consolidated Ordinance, 1898, and provide that the council of every municipality might pass by-laws for "regulating the assize of bread and preventing the use of deleterious materials in making bread," and provide also for the seizure and forfeiture of bread made contrary thereto. By ch. 28 of 1903, the town of Regina was incorporated under the name of "The City of Regina;" and it was urged on behalf of the defendants that the by-law of the town of Regina lapsed because of the last mentioned enactment. I presume that the boundaries of the town and city were coterminous. I so presume because nothing to the contrary was urged. It was urged that the powers conferred upon the town by virtue of the Municipal Ordinance were not carried forward to the civic authorities under sec. 11 or sec. 12 of the Interpretation Act (ch. 4 of 1907), because there was no repeal of the provisions of the Municipal Act, and it was only where there was a repeal that secs. 11 and 12 of the last mentioned Act would operate. Now, there are no express words of repeal that I can find in ch. 28 of 1903, but I do find this, under sec. 1: "From and after the passing of the Ordinance the inhabitants of the city of Regina as hereinafter described, and their successors, shall be and are hereby declared to be a body corporate within the meaning of the Municipal Ordinance. Provided that the corporation of the municipality of the town of Regina shall not be deemed to be dissolved by this Ordinance, but the same shall always be deemed to be the same corporation as that known hereunder as the city of Regina." I cannot understand these words in any other sense than as conferring upon the civic authorities all the powers that were conferred upon municipalities by the first Municipal Ordin-

ance, and that would include the power to make by-laws in the same manner and to the same extent as the municipalities had power to make them, but it not only confers upon the civic authorities the power to make by-laws of a similar character, but it continues the corporation of the town of Regina, and that continuation carries with it everything that appertained to the town, and carries with it the by-laws that existed at the date of the Ordinance of 1903 incorporating the city. I am, therefore, of opinion that this objection should not be allowed to prevail.

It is next contended on behalf of the defendants that the by-law is unreasonable: (a) because it prohibits the making or selling or offering for sale of bread unless it is of certain specified weight, whether more or less; that is, there is a penalty not only for selling bread under weight, but the same penalty is provided for selling over weight; (b) it is unreasonable because there is a natural shrinkage in the making of bread, which absolutely prohibits persons from making it a specified weight.

I think that in dealing with this question it would be as well to understand what is meant by an "assize" of bread. It is an expression which I find running through a great many Acts dealing with the subject. It ran through the Ontario Act—at any rate the one mentioned in Re Nasmith and City of Toronto, 2 O. R. 192. In that case Hagarty, C.J., who delivered the judgment of the Court, quoting from Wharton's Law Dictionary, states (p. 193): "The apparent meaning of 'the assize of bread' seems to be 'the power or privilege of assizing or adjusting the weight or measure of bread.'" In the New English Dictionary, title "assize," p. 512, the word is defined as follows: "The standard or quantity or measure or price ordained by ordinance, and then, hence, measurement, dimensions." I take it, therefore, that the power given by the legislature was to make by-laws regulating the standard of quantity or measurement of bread. Now the by-law in question provides, so far as the question under discussion is concerned, as follows: "(1) That the assize of baker's bread for this town shall be the loaf weighing 4 lbs., and the half weighing 2 lbs., and no person shall sell or dispose of any loaf of any other size or weight. (2) Nothing in the last preceding section contained shall be construed or extended to prevent bakers or other persons from selling biscuits, buns, rolls, crackers, muffins, or any other fancy cakes commonly made in the trade. (5) That all bread made, sold, or offered

for sale contrary to the provisions of this by-law, shall be seized and forfeited and sold by the inspector for the benefit of the town." And it then went on to provide a penalty or fine of $50, exclusive of costs, against any person or persons guilty of an infraction or breach of any of the provisions or enactments of the by-law, to be recovered upon conviction before any justice of the peace having jurisdiction in the municipality. It will be observed that sec. 1 provides "that no person shall sell or dispose of any loaf of any other size or weight, that is, of 4 lbs. and 2 lbs., respectively. It is urged, as stated before, that under such a provision a person who sells a loaf weighing more than 4 or 2 lbs., as the case may be, is liable to the penalty provided. Now, unquestionably, if that were correct, I should have no hesitation in holding the by-law unreasonable. But I am of opinion that that is not correct. Statutory provisions have been in force for a very great length of time, both in England and in Canada, regulating the assize of bread, and the intention of all of them is clear, that is, to provide that bread-sellers shall give a quid pro quo in receiving money for bread, and shall not sell under weight nor sell a light loaf. In England it is sought to bring that object about by insisting that all bread sold shall be weighed—at any rate, if desired; in Canada, where a law on the subject has been passed, the provision generally has been that the loaf shall be of a certain standard weight. No legislation has ever attempted or sought to make a person liable to a penalty for giving more bread than the specified weight. In view of what the evil is, and what the legislature proposed to remedy, I see no difficulty in construing this enactment. It is a well-known rule for construing a statute to inquire first what the evil is that the legislature has attempted to remedy, and then to apply the statute to remedy that evil, if apt words are used for the purpose. Apply that rule here. Suppose a person was brought before a magistrate under this by-law for selling bread of a greater weight than 4 or 2 lbs., as the case may be. Would a magistrate convict the prisoner? It seems to me that if he had even a very slight knowledge of the law he would not, and if he did I think the Court of Appeal would set it aside, upon the ground that the object of the enactment was not to prevent persons selling over weight, but to prohibit persons from selling under weight, or light weight, and that, therefore, the person who had sold over weight was not within the purview or the intention of the enactment. Now, if this is so, the only conclusion that I can

bring my mind to is that the by-law is not unreasonable. The very moment that I am driven to the conclusion that I cannot put the construction on the word "other" so as to embrace a person selling over weight, the only result is that the word "other" refers to persons selling light weight.

But again, it seems to me that the words of the by-law would only cover persons selling light weight. The language is as follows: "The assize of baker's bread for this town shall be the loaf weighing 4 lbs. and the half weighing 2 lbs., and no person shall sell or dispose of any other loaf of any other size or weight." Now, suppose again a prosecution was brought against a person for selling over weight. Could it be said that his loaf did not weigh 4 lbs. or 2 lbs. as the case might be? Suppose it was a full loaf, and weighed 4 lbs. and 2 ozs., it would weigh 4 lbs.; the same would apply to a 2 lb. loaf. Then if the loaf contained what the by-law required, there would be compliance with the by-law. I repeat that if the loaf contained 4 lbs. and 2 ozs. it would contain 4 lbs., and therefore there was not a breach that would come within sec. 5 and make it bread made, sold, or offered for sale contrary to the provisions of the by-law, because it contained quantities which the by-law said it must contain, and for the same reason he would not be guilty of an infraction of the by-law to make him liable for the penalty. Therefore, to my mind, the by-law is not unreasonable on that ground.

It is said it is unreasonable because it is so difficult to make bread of the prescribed weight. Now it seems that bread will shrink. It was testified to, at least, in this case, that it would be impossible to make a loaf of the exact weight. I think that must be conceded. It runs through the judgment of the Court in Re Nasmith and other cases which it is not necessary to cite. But while that is so, there seems to me to be no difficulty in preparing the bread so that when it comes out of the oven, and for some time afterwards, it may remain of the proper weight or a little over. In Re Nasmith the prosecution was for not stamping the bread: see p. 192. The by-law there provided that the weight of every loaf of bread sold or offered for sale in the city of Toronto should be stamped thereon. The Court held that by-law to be intra vires. Now it would be no more difficult to make bread of the prescribed weight, in the sense in which I have used the term "prescribed weight," than it would be to stamp bread the prescribed weight. If the Ontario ordinance was good

—and I quite agree with the judgment of the Court in holding that it was—I am of opinion that this by-law was not invalid for this reason. I may add, in view of the usage so long followed in Canada of making the assize of bread by the loaf, it is too late to successfully contend that it is unreasonable to do so.

It was contended, however, that the defendant Williamson was not guilty of this offence at all. It will be observed that the by-law is confined entirely to baker's bread; that the assize of baker's bread for this town shall be as prescribed. The evidence of the defendant in effect is, or was, that the bread that he baked was not baker's bread; that it was not known as baker's bread; that the bread that he manufactured and which was seized was known to the public as fancy bread. Now this is uncontradicted, and the onus of proving that the defendant had committed the offence was on the prosecutor. And I am of opinion that he failed to prove that this was baker's bread. Why the framers of the by-law should have put the word "baker's" in, I do not know, but they have done so, and if it is intended to bring the person summoned within the penalties provided for by the by-law, it must be shewn that he came within the prohibition. For this reason the order dismissing the information should be affirmed, and this appeal dismissed; and I see no reason why the usual consequences should not follow, that the appeal be dismissed with costs.

It was admitted in the case of the defendant Feihne that there had been a breach of the by-law, provided that the by-law was a good one. The consequence is that this appeal must be allowed, and the defendant convicted of a breach of the by-law, and he will forfeit and pay a fine and penalty of $5 exclusive of costs and costs of the proceedings before the justice of the peace, to be paid within 10 days, or on default of payment within 10 days of such fine and costs, he be imprisoned in the common gaol at Regina for a period not exceeding 10 days. The defendant will also have to pay the costs of this appeal.

In dealing with these appeals I do not feel called upon to discuss what effect ch. 46 of the Acts of 1906 may have upon the by-law in question, as the matter was not raised or discussed before me.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 28TH, 1908.

CHAMBERS.

RE TUDGE PORK PACKING CO.

Land Titles Act—Caveat—Continuance—Consent—Failure to Obtain Leave of Judge—Lapse—Dominion Act—Saskatchewan Act—Estoppel.

Summons by J. M. Wessel, liquidator of the company, to continue a caveat under the Land Titles Act.

Gordon, for J. M. Wessell.

T. S. McMorran, for Florent G. Arnold, the registered owner.

WETMORE, C.J.:—One Florent G. Arnold appears to be the registered owner of lots 16 to 25, both inclusive, in block 15, and all of block 28, referred to in a plan of the eastern annex of the city of Regina, being a subdivision of the southwest quarter of section 29, township 17, range 19 west of the second meridian. On 17th April, 1906, James M. Wessell, as liquidator of the Tudge Pork Packing Co. Ltd., lodged a caveat against these lots, claiming to be the owner of the same in fee simple as such liquidator. On 12th February, 1907, and without any leave obtained from a Judge to do so, Mr. Wessell lodged a further caveat against the same land, claiming under the same right as in the first caveat. About 25th October, 1907, Wessell received from the registrar of land titles a notice under sec. 141 of the Land Titles Act, Saskatchewan, that the caveat filed on 12th February, 1907, would lapse at the expiration of 30 days from the mailing of the notice, unless within that time he filed an order of a Judge continuing the caveat beyond the 30 days. The material before the does not state who required the registrar to give that notice, but I presume it was Arnold. However, on 19th November, on application of counsel on behalf of Wessell, I made an order continuing the caveat registered by the liquidator against the lands in question in force until 15th De-

cember. That order was made by consent of the solicitors for Arnold, and was made ex parte. I do not consider this consent as acknowledging any rights in the matter. It was merely a courteous consent on the part of Arnold's solicitors so as to enable Wessell's solicitors to take action if they had any rights in the matter, and, in pursuance thereof. Wessell, by his counsel, on 5th December, applied and took out a Chambers summons to continue this caveat until the final winding-up of the company, and for such further or other order as to the presiding Judge might appear meet. The notice given by the registrar of land titles had reference to the caveat filed on 12th February last. I take it, therefore, that all the subsequent proceedings had reference to that caveat. In fact, they must have had reference to it, because they could have reference to no other.

It is set up in answer to this application that it should not be entertained, because Wessell had no right to lodge the caveat of 12th February. The caveat of 17th April was lodged under the Dominion Land Titles Act, 1894, and sub-sec. 6 of sec. 99 of that Act, as substituted by sec. 15 of the Acts of 1898, ch. 32, provided that "a caveat shall lapse after the expiration of 21 days from service on the caveator, or at his address for service, proved to the satisfaction of the registrar, of a notice that such caveat shall lapse unless the proper proceedings hereinafter in this subsection set forth are taken by the caveator, or, if no such notice is meanwhile served, then after the expiration of 3 months from the receipt by the registrar of such caveat, unless within said period of 21 days or 3 months, as the case may be, proper proceedings in a Court of competent jurisdiction have been taken to establish the coveator's title to the estate or interest specified in the caveat, and an injunction or order has been granted restraining the registrar from granting a certificate of title or otherwise dealing with the land." No notice was served on the caveator as specified in the above recited section, and no proceedings were taken in a Court to establish the caveator's title to the land, and no injunction or order was granted restraining the registrar from granting the certificate or otherwise dealing with the land. Consequently the caveat lodged in April, 1906, lapsed. Sub-section 8 of sec. 99 provides that after "such . . . lapse . . . it shall not be lawful for the same person or any one on his behalf to lodge a further caveat in relation to the same matter unless by leave of the

Judge." It is quite clear that if the Dominion Land Titles Act remained in force, the lodging of the caveat on 12th February last would have been invalid, but the Land Titles Act, Saskatchewan, came into force on 8th September, 1906, and sec. 136 of that Act provides as follows: "Any person claiming to be interested in any land under any will, settlement, or trust deed, or under any instrument of transfer or transmission, or under any unregistered instrument, or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made, and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed, as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat."

It may be as well to state that this section is word for word the same as sub-sec. 1 of sec. 99 of the Dominion Land Titles Act. Section 140 of the Saskatchewan Act provides that the owner or other person claiming the land may by summons call upon the caveator to attend before a Judge to shew cause why the caveat should not be withdrawn, and the Judge may, upon proof that the caveator has been summoned, and upon such evidence as the Judge requires, make such order as to him seems fit. Then sec. 141 of the last mentioned Act is as follows: "Subject to the provisions of the preceding section, such caveat shall continue unless and until it is removed as hereinafter set forth, namely: The owner or other person claiming such land may require the registrar by notice in writing, which shall be in the form BB in the schedule to this Act, to the registrar, to notify the caveator as his address for service as set forth in the caveat, that such caveat shall lapse at the expiration of 30 days from the mailing of such notice by the registrar, unless within said 30 days the caveator shall file with the registrar an order made by the Judge providing for the continuing beyond the said 30 days of said caveat, and in the event of such order not being filed with the registrar within the said 30 days, such caveat shall lapse and shall be treated as lapsed by the registrar; the notice hereinbefore provided to be given by the registrar shall be by registered letter."

It will be observed that both the last two cited sections provide that a caveat filed under the provincial Act shall continue in force until steps are taken by the owner of the land or other person interested to have it removed. It is urged that under the provisions of the provincial Act any person can lodge a caveat, irrespective of the question whether he has filed a caveat which has lapsed or not, and without leave of a Judge. Sections 202 and 203 of the provincial Act were enacted to preserve rights, existing, acquired, or accrued before the Act came into force; and sec. 203 is as follows: "Nothing in this Act contained shall affect any act done or any right or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause, before the coming into force of this Act."

Now what was the situation at the time the provincial Act came into force? The caveat lodged by Wessell on the 17th April had lapsed. It lapsed on 17th July, and the right which Arnold, the owner of the property, had was to hold his land free and clear of any power on the part of Wessell to lodge another caveat in the same right against that land without leave of a Judge. Now, I hold that clearly to be a right, existing and accrued, and, that being so, that right was preserved to him by sec. 203 of the provincial Act which I have just referred to, and, therefore, Wessell had no power nor authority to lodge or the registrar to receive the caveat of 12th February, no leave of a Judge having been obtained to lodge it.

I hold that caveat to be improperly lodged, and of no force or effect. It was set up that Arnold having made the requisition to the registrar under sec. 141 of the provincial Act to give the notice therein mentioned, and to which I referred in an earlier part of this judgment, he is estopped from setting up that the caveat was improperly lodged. I am of opinion that this is not correct. These provisions were not intended to allow parties by consent to do what an order of a Judge is required for.

This application will, therefore, be dismissed, with costs to be paid by Wessell to Arnold.

I may add that I am at a loss to understand from the standpoint of the liquidator why he should be so anxious to obtain a right with reference to this land. I notice from his affidavit that he values it at only $30. It would, therefore, appear to me that, in so far as the creditors are concerned, the property is not worth the trouble and litigation that has already arisen with respect to it.

YUKON TERRITORY.

CRAIG, J. JANUARY 20TH, 1908.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. DONOGHUE.

Settlement of Action—Partnership—Authority—Solicitors—Motion to Enforce Compromise—Validity—Issue.

Motion by plaintiffs to enforce a settlement or compromise of the action.

F. J. Stacpoole, for plaintiffs.

No one appeared for defendants.

CRAIG, J.:—This action was begun in 1904, the plaintiffs suing on a promissory note, the defendants at the time denying the partnership and the firm name, and further setting up a very voluminous defence, the nature of which shortly is that Donoghue and Barrett had bought a large quantity of oats and hay from one T. G. Wilson, obtaining from the bank advances to pay for part of the purchase, the goods being stored in a warehouse under the control of the bank who had the warehouse receipts, and that the bank undertook with the defendants to see that all the moneys realized from the sale of the goods were applied on this specific account to reduce the indebtedness of the defendants created with the bank for the purpose of this purchase; that the bank agreed to protect the defendants' interests in this respect, and to credit all moneys received from these sales on the defendants' account, and to see that no sales were made and no delivery of goods made except in pursuance of the agreement; that in breach of the agreement the bank had allowed the goods to be sold and the moneys applied on other indebtednesses of Wilson than this particular indebtedness of the defendants, really in breach of trust.

After joinder of issue and reply, a settlement was arrived at with the defendant Barrett, and there is produced to me a receipt, or a copy of a receipt, given by the manager of the bank and the plaintiffs' solicitors in the following

form: "Canadian Bank of Commerce v. Donoghue and Barrett. Received from Dr. W. T. Barrett cheque for $4,500 and promissory note at 60 days, signed by T. J. Donoghue and indorsed by Dr. W. T. Barrett, in favour of the Canadian Bank of Commerce, in pursuance of a settlement made between the plaintiffs and the defendants in the above action, whereby $9,000 was to be paid by the defendants in full settlement of the above suit, and which cheque and promissory note are received by the plaintiffs in full settlement of the above action; the plaintiffs retaining the book debts assigned to them; all moneys collected thereon to be the property of the bank. D. A. Cameron, manager; Clark, Wilson, & Stacpoole, solicitors for the plaintiffs the Canadian Bank of Commerce."

Pattullo & Ridley were solicitors for the defendants in the action. Nothing was done after 16th May, 1905, the date of this receipt, the bank resting on the settlement, and apparently the defendants also. Lately and during 1907 the defendant Donoghue has been making demands on the bank for an accounting in pursuance of and along the lines of his original defence in this action, and threatening an action in the province of Quebec for an accounting. After these threats Mr. Cameron, the manager of the bank, wrote to Barrett, the defendant, saying that the bank proposed to make a motion for judgment in the action to confirm the settlement and to dispose of the action and the counterclaim by that motion, and asking him if he intended to take the stand in making said settlement that he acted bona fide under the powers which he considered he had as a partner in the firm of Donoghue & Barrett, and also by virtue of a power of attorney which he held from Donoghue to bind his co-defendant Donoghue, and whether he (Barrett) could support and assist him (Donoghue) in any attempt which he made to avoid the settlement. To this Barrett replied referring the writer to his solicitor J. B. Pattullo.

Now the bank move for an order that the defendants do abide by the settlement of 16th May, 1905, and that that be made the judgment of the Court. In support of this they file the papers already mentioned and an affidavit of Mr. Sanson, the present manager of the bank, who says that at the time of the transactions in question he was in charge of the bank securities, and was aware of the matters in issue.

He verifies the receipt as being a copy which the bank hold, and states that the settlement was made on behalf of the plaintiffs by their solicitor, Mr. Clark; that he was informed by Mr. Clark, now not in the Territory, that Mr. Ridley, of the firm of Pattullo & Ridley, said that he had no objections to Mr. Clark making a settlement with the defendant Barrett; that no steps have been taken in the action since that date; that since the making of the settlement Donoghue has threatened and is still threatening to bring an action in the province of Quebec.

I have no evidence that there is any partnership between Barrett and Donoghue; in the pleadings the partnership is denied. There is no evidence of any specific authority from Donoghue to Barrett. A power of attorney is mentioned in a letter, but not produced. Barrett has been served with notice of these proceedings in this action. Pattullo & Tobin, the successors of Pattullo & Ridley, have also been served, but did not appear on the motion. Mr. Tobin, of that firm, called on me and said that he had no instructions from Donoghue; that he wrote to him some time last autumn, when the letters were written, asking for instructions, and received word that papers were being forwarded, but no papers have arrived, and no other instructions have arrived since. They decline to appear and say that they are not now the solicitors of the parties.

If the settlement was a binding one, the question might arise how far the solicitors on the record—Pattullo & Ridley—are still the solicitors of the defendants so that notice to them would bind their clients. At this stage of the proceedings I do not consider it necessary to deal with that question any further, in the view which I take of the case. I certainly could not, on the material before me, make any order that the settlement be made an order of the Court, without hearing evidence that the settlement was bona fide and made with the consent of all the parties to the suit.

Our Judicature Ordinance, sec. 8, sub-sec. 5, provides for all the remedies which may be given in an English Court being given here, and in part 4, vol. 2, of the Annual Practice, under the word "Compromise," I find that "parties acting honestly without intending to cheat may compromise an action without the intervention of their solicitors. A compromise made in Court may be made an order of the

Court. Where an action has been discontinued in pursuance of the terms of the compromise, such compromise cannot be made an order." This action, as it appears, has never been discontinued. There are lots of authorities for staying an action on the part of the defendants, where the plaintiffs insisted on proceeding after settlement made, and I see no good reason why the contrary should not be equally available to a plaintiff who wishes to enforce a settlement against a defendant who is attempting to break up a settlement, and, further than that, attempting to bring an action on a counterclaim which was included in the compromise or settlement, because this settlement not only settled the action of the plaintiffs, but settled the counterclaim of the defendants, if made with the authority of Donoghue.

I might refer to the case of Eden v. Naish, 7 Ch. D. 781. The head-note of that case is this: "A partnership having, in an action brought by the plaintiff, been by order of the Court dissolved, the plaintiff and defendant signed an agreement to compromise, whereby it was agreed that the plaintiff should be paid a sum of money for his share in the business; the plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud. Held, that on summons taken out by one of the defendants, and supported by the co-defendant, the Court had, under the Judicature Act 1873, sec. 24, sub-secs. 5 and 7, jurisdiction to order the stay of all further proceedings in the action." In that case there was an examination ordered as to the settlement.

I would also refer to Rees v. Carruthers, 17 P. R. 51. Boyd, C., in deciding the case, said: "The proper practice to be observed in this case is provided for by the Judicature Act, under sec. 52 (9) and (12), and it is briefly this: that the Court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action. Here the action was to be dropped and $10 costs to be paid by the defendant. Upon this the plaintiff has based his inaction; and on this he is content to let the matter rest. The only matter to be tried is, settlement or no settlement, as neither party wishes to go to trial of the action. Now, the collateral point may be either disposed of in a summary way, or, if either party so desires, by an issue on which viva voce

evidence can be given. If the result is a valid settlement, there should be a perpetual stay of proceedings, and the costs be paid by the defendant; if the settlement is invalid, the action should be dismissed with costs to the defendant."

There is also the case of Davidson v. Merritton Wood and Pulp Co., 18 O. R. 139. In that case an assignee for the benefit of creditors under a statutory assignment, having brought an action for damages for breach of a contract made by his assignor with the defendants, made a compromise settlement with the defendants, before the delivery of pleadings, while he was in gaol, and without reference to the inspectors or creditors. A new assignee appointed in his stead applied for an order directing the trial of an issue to determine whether the settlement was valid. Held, that it was not necessary to bring another action to vacate the settlement, and it was more convenient to revive the action in the name of the new assignee as plaintiff and let him continue it, leaving the defendants to move summarily to stay it, or to plead the settlement in bar, than to direct the trial of an issue.

In the case I am considering, as I have already said, it would be impossible for me, on the material which I have, to declare the settlement an order of the Court, as there is no evidence whatever that Donoghue assented in any way. The only evidence is that solicitors for the parties agreed that Barrett might settle. They took no part in the settlement. There was no motion made at the time, when the matter was fresh, to confirm the settlement by an order, which certainly should have been done at the time. The firm of Pattullo & Ridley is not existent. Pattullo is still in Dawson with a new partner, and Mr. Ridley, who, it is said, assented to Barrett making a settlement, is not here. Mr. Clark, who made the settlement, is also out of the Territory, but his case is not so important, as the bank stand on the settlement.

What should be done, I think, is that an issue be directed to try the validity of the settlement, as to whether Barrett the defendant had authority to settle as he did and bind Donoghue. For this purpose an issue will be directed, which must be served on Donoghue personally, if possible,

on Barrett the defendant, personally, and on the solicitor Pattullo. Of course if the settlement is found invalid, then the action will proceed in the ordinary way. I will hear the parties further as to the form of the issue and the date of the trial.

The costs will be reserved.

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MANITOBA.

THE REFEREE. FEBRUARY 1ST, 1908.

CHAMBERS.

FOULDS v. BOWLER.

Discovery—Action to Revoke Probate of Will in Favour of Earlier Document—Leave to Defendant to Photograph Document Produced by Plaintiff—Terms—Costs.

Motion by defendant for an order for leave to photograph a document produced by the plaintiff.

The action was brought to revoke the grant of letters probate of a will.

The testator died 4th December, 1898, having made a will dated 28th November, 1898, which was duly proved and acted upon.

The testator's son, the plaintiff, filed a statement of claim alleging that in a box of old papers he had recently found a holograph will made by his father dated 2nd December, 1898, and asked that the grant of probate be revoked and probate granted of the holograph will.

This was the document in question on the motion.

G. D. Minty, for defendant.

A. Haggart, K.C., for plaintiff.

THE REFEREE ordered that the defendant be at liberty to make or cause to be made photographic reproductions of the alleged holograph will in question, in the presence of the

prothonotary, upon 24 hours' notice in writing to the plaintiff's solicitors of the time and place of such photographing. Costs to be left to the determination of the trial Judge. Lewis v. Earl of Londesborough, [1893] 2 Q. B. 191, followed.

MANITOBA.

MATHERS, J. FEBRUARY 3RD, 1908.

TRIAL.

MONTGOMERY v. MITCHELL.

Company—Lien on Shares for Indebtedness of Shareholder to Company—Seizure of Shares by Sheriff under Execution against Shareholder—Claim of Lien by Company—By-laws of Company Creating Lien—Power of Company to Make—Manitoba Joint Stock Companies Act—Existence of Debt to Company—Promissory Note—Liability—Extinguishment—Waiver by Discounting Note.

Sheriff's interpleader application as to some shares in the capital stock of the F. W. Law Stationery Company, Limited, which by consent was disposed of summarily.

On 15th February, 1906, an agreement was entered into between the company and Amos E. Mitchell, the judgment debtor, and Elizabeth Adeline Mitchell, his wife, under which the latter became the purchaser of 80 shares of the capital stock of the company, for the price of $8,000, which Mrs. Mitchell covenanted to pay, the sum of $6,000 in cash upon the execution of the agreement, and the additional sum of $2,000 to be paid by her promissory note, payable two months after date, with the right to renew the note, upon terms not material to specify.

The agreement provided that Amos E. Mitchell should be employed by the company as treasurer, and should also be made a director.

Mrs. Mitchell paid the $6,000, and gave her note for the $2,000, pursuant to the terms of the agreement, and the note was discounted by the company with their bankers. When this note fell due, a renewal was not obtained from Mrs.

Mitchell, but A. E. Mitchell, who was then the treasurer of the company, gave his own note to the company, and, as such treasurer, indorsed it with the name of the company, and discounted it in the company's bank. This second note fell due on 21st August, and on that date it was again renewed, A. E. Mitchell in the same way giving his own note for the full amount, and also his own note for the interest that had accrued. These latter two notes were in like manner indorsed in the name of the company— but on this occasion by C. Mackenzie as treasurer—and discounted with the company's bankers.

The plaintiff on or about 7th February, 1906, recovered a judgment against the defendant A. E. Mitchell for $1,136.70 debt and $28.49 costs, which judgment was still unpaid. On 1st May, 1907, the plaintiff recovered in the Court of King's Bench a judgment against Amos E. Mitchell, Elizabeth Adeline Mitchell, and the F. W. Law Stationery Company, Limited; by which it was declared that the shares in the capital stock of the company standing in the name of or held by Elizabeth Adeline Mitchell were so held by her merely as trustee for the defendant Amos E. Mitchell, and that she had no interest therein, and that the shares were the absolute property of the defendant Amos E. Mitchell, and available under execution in satisfaction of the plaintiff's judgment for $1,165.19.

Nothing further was done under that last mentioned judgment, and on 27th November, 1907, the sheriff, acting under an execution issued on the plaintiff's judgment against the defendant Amos E. Mitchell, seized the shares standing in the name of Elizabeth Adeline Mitchell as being the property of Amos E. Mitchell, pursuant to the Executions Act.

The last note given by Amos E. Mitchell fell due on 25th November, two days before the seizure by the sheriff, and was on that day taken up by the company.

Under the by-laws the company claimed a lien upon the shares for the amount of Mrs. Mitchell's indebtedness to the company.

H. A. Burbidge, for the execution creditor.

G. W. Baker, for the claimants.

MATHERS, J.:—The general by-laws of the company contain the following:—

"The company have the first and paramount right of lien upon all the shares registered in the name of each mem-

ber, whether solely or jointly with others, for all his debts, liabilities, or engagements solely or jointly with any other member to or with the company, whether the period for the payment, fulfilment, and discharge thereof shall have actually arrived or not, and no interest in any share shall be recognizable by the company, unless such debt, liability, or engagement shall have been satisfied, and such lien shall extend to all dividends from time to time declared in respect of such shares, unless otherwise agreed. The registration of the transfer of shares shall not act as a waiver of the company's lien, if any, on such shares.

"16. For the purpose of enforcing such lien, the shareholders may sell the shares subject thereto, and such money as they think should be so held shall be held until such period as aforesaid shall have arrived, or until notice in writing of the intention to sell shall have been served on such member, his executors or administrators, or until default shall have been made by him or them in the payment, fulfilment, and discharge of such debt, liability, or engagement, for one month after such notice; and the maker of any such sale shall not be impeached by any person, and the remedy of any person agreeing to the sale shall be in damages only, and as against the company exclusively."

Under these by-laws the company claim a lien upon the shares for the amount of Mrs. Mitchell's indebtedness to the company. It was contended by counsel for the plaintiff that the company were estopped by the judgment recovered against them on 1st May, 1907, from denying that these shares were available under execution for satisfaction of the plaintiff's judgment. It is said that the company, being a party to that action, should have then set up any claim of lien, and that, not having done so, they are now estopped from doing so. At the time that judgment was recovered, the note given by Amos E. Mitchell to the company was current, and it was under discount in the company's bank. There was, therefore, at that time no debt due from either Mitchell or his wife to the company, and it was not in their power at that time to have set up any lien. The company would be estopped from now setting up any lien that existed at the time the judgment was recovered, but I cannot hold that the estoppel extended to a right of lien that might subsequently arise before the shares became charged with the plaintiff's execution. Default was made in payment of the note on 25th November, and the sheriff did not attempt to seize the shares

in question until 27th November. As soon as default was made and the note was taken up by the company, a debt arose for which the company under their by-laws were entitled to a lien, and it seems to me they were not at that time estopped from asserting that lien. The by-law only purports to give a lien upon all shares registered in the name of a member for a debt due by that member. These shares are not registered in the name of Amos E. Mitchell, and, under the terms of the by-law, the company can have no lien on these shares for any debt due by A. E. Mitchell. It is said that when Mrs. Mitchell originally gave her note to the company, that note was accepted as payment by the company. It is true that the language of the agreement is that the shares shall be paid by $6,000 cash and the additional sum of $2,000 to be paid by a promissory note. As soon, however, as the promissory note was given, there was a liability from Mrs. Mitchell to the company, and the language of the by-law is that there shall be a lien "for debts, liabilities, and engagements," and, unless the liability upon that promissory note has been discharged, there is still a liability from Mrs. Mitchell to the company. It is said that the acceptance by the company of the promissory note of A. E. Mitchell, in lieu of his wife's note, constituted payment of his wife's note. It appears that when Mrs. Mitchell's note fell due, without consulting the other directors of the company, A. E. Mitchell, as treasurer, simply gave his own note. It would be impossible to hold that the acceptance of the husband's note, in such circumstances, operated as a payment of Mrs. Mitchell's note. When the husband's first note fell due, a new note was taken from A. E. Mitchell. It is not shewn whether the officers of the company had knowledge of that circumstance, but it appears to me that the onus of shewing that this second renewal of A. E. Mitchell's note was taken as payment of Mrs. Mitchell's original note, would be upon those asserting it. Prima facie the taking of a note, even of a third party, is not payment, but those who assert it must affirmatively shew that it was so taken: Patterson v. McDougall, 26 Nova Scotia Reports 209. Under all the circumstances, I could not hold that Mrs. Mitchell's note has been paid. It appears, therefore, that there is still, within the meaning of the by-law, a debt, liability, or engagement from Mrs. Mitchell, in whose name the shares stand, to the company.

By sec. 45 of the Joint Stock Companies Act, the company are not bound to see to the execution of any trust. As

far as the company are concerned, Mrs. Mitchell is a shareholder, and they would have a right to assert their lien upon the shares standing in her name for any debt, liability, or engagement due from her to the company, if the company have power to pass such a by-law.

Whether or not the company have such power is a question involving considerable difficulty. There is no express provision in the Joint Stock Companies Act giving such a power. I think it reasonably clear that there is no common law lien. This seems to be the result of the authorities: 10 Cyc. 580; Murray v. Pinkett, 12 Cl. & F. 764; Pinkett v. Wright, 2 Hare 120; Healy's Joint Stock Companies, p. 95; Palmer's Company Law, p. 112.

The power to pass by-laws is contained in sec. 31 of the Companies Act, which, amongst other things, gives the company power to make by-laws not contrary to the law or the letters patent of the company: to regulate the issue and registration of certificates of stock, the transfer of stock, and the conduct in all other particulars of the affairs of the company. Section 44 provides that the stock of the company shall be deemed personal estate, and shall be transferable in such manner only and subject to such conditions and restrictions as therein or in the letters patent or in the by-laws of the company are contained. And sec. 55 provides that no share or shares shall be transferable until all unpaid calls thereon have been fully paid in, or until declared forfeited for non-payment of calls.

In England it is held that the articles of association may confer a lien on the shares of a debtor to the company. The English Act expressly authorizes the directors to refuse to sanction a transfer where the transferor is indebted to the company, and it is apparently under this provision that it is held there that the company have power by articles of association to declare a lien on the shares of a debtor to the company. These articles of association are prima facie binding on each shareholder, and their registration in the manner prescribed by the Act supplies the notice with which the public is held to be fixed in its dealings with the company. Everyone, be he shareholder or creditor, must be taken to deal with the company according to its constitution, as appearing upon its memorandum and articles of association, and he cannot complain of what may be done pursuant to that constitution, however it may affect him: Healy on Joint

Stock Companies, p. 2; Marshall v. Glamorgan, L. R. 7 Eq. 129, 137.

In Manitoba and Ontario, however, the opposite is the case, and the public are not bound by notice of the company's by-laws: Masten's Company Law, p. 161: McEdwards v. Ogilvie, 4 Man. L. R. 6—unless, perhaps, the by-laws are incorporated in the charter of the company, as might be done under sub-sec. (b) of sec. 7 of the Companies Act, which provides that the petition may ask for the embodying in the letters patent of any provision which otherwise, under the provisions thereof, might be embodied in any by-law of the company when incorporated.

Section 44 gives power to impose conditions and restrictions on the transfer of shares, under which I am inclined to think the company might make a by-law that no transfer of shares by a shareholder would be recognized until the debts due to the company by such shareholder were paid. The by-law in this case does not pretend to be enacted under this section, or to in any way deal with the transfer of shares, and this section cannot be construed as conferring power to pass this by-law. Section 31, as before pointed out, mentions a number of matters concerning which by-laws may be passed, and adds, "And the conduct in all other particulars of the affairs of the company." Unless the power is conferred by these general words, I can see no other provision in the Act conferring it.

The power to pass such a by-law is sometimes inferred from the most general words. In Child v. Hudson's Bay Co., 2 P. Wms. 207, it was held by Lord Chancellor Macclesfield that, as the company were empowered by their charter to make by-laws for the better government of the company, a by-law providing that if any member should be indebted to the company, his stock in the company should, in the first place, be liable to the debts which the member should owe the company, was a good by-law. In Société Canadienne Francaise de Construction v. Daveluy, 20 S. C. R. 449, it was decided that a company having a general power to make rules for its government not contrary to the laws in force in Lower Canada might make a by-law restraining the transfer of shares, the holder of which was indebted to it and creating a privilege thereon for the amount of the indebtedness, and such was operative against his creditors upon his insolvency, on the ground that the creditor had only the same rights in respect of the shares as the shareholder had.

It is said by some authorities that a by-law is an agreement between the shareholders. Taking that view I see nothing unlawful in the shareholders agreeing by by-law that the shares of each shall be liable to the company for the debts owing by any such shareholder to the company. I have very little doubt but that shareholders may, as between themselves and the company, so charge their shares. As the public are not charged with notice of the company's by-laws in this province (McEdwards v. Ogilvie, 4 Man. L. R. 1), such a by-law would not protect the company against a bona fide purchaser of shares of a shareholder without notice. An execution creditor, however, has no higher or greater right than his debtor, the shareholder, and can only take such interest as the execution debtor has in the shares. I am, therefore, of opinion that, as against the plaintiff, the company have a lien upon the shares in question.

I was pressed with the argument that, if such lien did exist, it was waived or lost by taking and discounting a promissory note for the debt for which the lien is claimed, and Arbuthnot v. Winnipeg Manufacturing Co., 16 Man. L. R. 401, 4 W. L. R. 48, and National Supply Co. v. Horrobin, 16 Man. L. R. 472, 4 W. L. R. 570, were relied upon. These cases decide that the discounting of a promissory note taken for a debt for which a mechanic's lien is claimed waives the lien, and that such lien does not revive upon the note being dishonoured and taken up by the claimant within the time for filing a lien. The analogy, to my mind, is not complete. In the one case the lien is a statutory right for the protection of one particular debt, which being once discharged, the right is gone. In the other case the lien is a continuing one for each and every debt that may arise. The moment there is a debt, liability, or engagement, there is a lien. As soon as the note was dishonoured and taken up by the company, a debt arose. Whether in the meantime, while the note was under discount, the lien is said to have been discharged, or waived, or merely suspended, seems to me entirely immaterial.

There will be judgment in favour of the claimants as against the plaintiff with costs.

MANITOBA.

MATHERS, J. FEBRUARY 3RD, 1908.

TRIAL.

TIRSCHMANN v. SCHULTZ.

Vendor and Purchaser—Contract for Sale of Land—Action for Specific Performance—Duress—Evidence.

Action for specific performance of an agreement to sell land. The defence relied upon was that the defendant was induced to execute the agreement by duress.

R. M. Dennistoun, K.C., and F. J. Sharpe, for plaintiff.

T. R. Ferguson and I. A. McKay, for defendant.

MATHERS, J.:—The duress alleged is that Mr. Foley, the homestead inspector, who was acting as a mediator between the parties, told the defendant that, if he did not agree to sell the land in question to the plaintiff, his homestead entry would be cancelled, and he would lose his farm. I do not believe that any such threat was made. The plaintiff says that Mr. Foley said that, if the defendant refused, he would report the matter to Ottawa, and the government would cancel the entry as to the portion sought to be purchased. Mr. Foley denies that any such threat was made. I think it extremely improbable that Foley said the government would cancel the entry as to this portion. He may have said that the government *might* do so, in the event of the parties failing to agree. I cannot, however, find that the defendant was induced by such statement, if it were made, to execute the agreement. Before he agreed to sign it, he stipulated for, and the plaintiff executed an agreement for, a right of way across his land. I find that it was this concession on the plaintiff's part that induced the defendant to agree to sell.

The defendant, I infer, thought that the few acres which he had agreed to sell would be deducted from the land for which he would receive a Crown grant. The agreement was dated 11th June, 1904, and the patent is dated 13th February, 1906. During the interval of a year and 8 months

between the agreement and the patent, the defendant did not once complain that he had been forced to sign the agreement against his will, or intimate an intention not to be bound by it. As soon, however, as he had obtained his patent, and observed that the land included in the agreement had not been deducted therefrom, he appears to have concluded that he had obtained an advantage over the plaintiff, and he at once wrote him a letter stating that he had the grant for the whole land, and he intended to keep it all. Up to that time I believe the defendant intended to carry out the agreement, and I think he must now do so.

There will be judgment that the agreement be specifically performed, with costs of suit to the plaintiff.

MANITOBA.

MATHERS, J. FEBRUARY 6TH, 1908.

CHAMBERS.

SCHATSKY v. BATEMAN.

Replevin—Præcipe Order—Sheriff Acting on—Delivery of Goods to Plaintiff—Order Set aside—Redelivery — Protection to Sheriff—Costs.

The plaintiff filed a statement of claim alleging the wrongful conversion by defendants of a team of horses, waggon, and harness, which had been sold to him by the defendants, and of which the defendants had taken possession under a lien note given to them by the plaintiff.

The plaintiff obtained from the registrar of the Court an order on præcipe that the sheriff replevy the property, under which order the sheriff took possession and delivered the property to the plaintiff.

Defendants moved to set aside the order of replevin, on the ground that the registrar had no jurisdiction or power to make such order, and for a direction that such goods and chattels be forthwith given up and redelivered to the defendants.

The order for replevin followed the form No. 112 in the schedule to the King's Bench Act, and was issued pursuant

to Rule 865. Rule 869 provides that in case the order issues on præcipe, the sheriff shall take and detain the property and shall not replevy the same to the plaintiff without the order of the Court or Judge in that behalf. In this case, the sheriff, after he seized the property, turned it over to the plaintiff.

H. A. Burbidge, for defendants.

E. R. Levinson, for plaintiff.

A. B. Hudson, for the sheriff.

MATHERS, J., made an order setting aside the replevin order with costs to the defendants in any event of the cause, protecting the sheriff, and directing the goods to be delivered back to the defendants; the sheriff's costs to be paid by defendants and added to their costs.

MANITOBA.

MACDONALD, J. FEBRUARY 10TH, 1908.

SINGLE COURT.

RE JONES AND MOORE ELECTRIC CO. OF MANITOBA.

Company — Winding-up — Contributories — Subscriptions for Shares—Agreement with Company for Issue of Paid-up Shares—Consideration—Accord and Satisfaction — Invalidity of Agreement—Ultra Vires.

Application by the liquidator to place on the list of contributories in the winding-up of the company John Wesley Jones and Frank B. Moore.

C. P. Wilson and J. D. Cameron, for the liquidator.

E. Anderson and C. P. Fullerton, for Jones and Moore.

G. D. Minty, for creditors.

MACDONALD, J.:—In July, 1905, the Hicks Electric Company were carrying on business in Winnipeg as dealers in electric wiring, supplies, machinery, and apparatus, and

as contractors for the installing, repairing, and replacing of such electrical wiring, supplies, machinery, and apparatus, and in the summer of that year the Jones and Moore Company, Limited, of Toronto, with a view to open out a business in Manitoba, shipped to the provincial exhibition held at Winnipeg, a number of motors and supplies, and, while John Wesley Jones was in attendance with his company's exhibit, he was approached by George J. Hicks with the suggestion that his company should buy the business of the Hicks Electric Company.

The suggestion culminated in the purchase by the Jones and Moore Electric Company, Limited, of Toronto, of the assets and business of the Hicks Electric Company, for the sum of $14,378.98, being the value placed upon the business, against which there were liabilities aggregating $9,717.56, which liabilities the Jones and Moore Company of Toronto assumed and gave their note for $4,603.03 for the balance of the purchase price. The business continued under the name of the Hicks Electrical Company until August, 1905, when it was decided to convert it into a joint stock company, and a petition (exhibit 1) was presented to the Lieutenant-Governor of Manitoba, praying for incorporation under the Manitoba Joint Stock Companies Act of the petitioners therein named, under the name of "The Jones and Moore Electric Company of Manitoba, Limited."

The petitioners and the amount of stock subscribed by each were: John Wesley Jones, $7,000; George J. Hicks, $2,000; Lawrence Maitland Delbridge, $100; James Charles Kavanagh, $100; Clarence Wilson Bradshaw, $100; and the declaration verifying the petition was made by John Wesley Jones.

The $7,000 thus subscribed by Jones I find was part of the $20,000 subsequently subscribed by him, and whatever might be the effect of the agreement (exhibit D) entered into between Jones and Moore and the company, by which it is contended that the stock for which they subscribed was fully paid, it could not, in my opinion, be made to apply to this $7,000, and Jones could only be relieved from liability for that amount by payment.

After the issue of the charter of incorporation (exhibit 2) John Wesley Jones and Frank B. Moore each subscribed for 200 shares of the capital stock of the company, and agreed (exhibit 3) to pay up their respective shares in such manner and at such times as might be lawfully determined, required,

or demanded by the said company. The shares were duly allotted to them, and certificates for such shares received by them. As shareholders to the amount mentioned Jones and Moore attended meetings of the company, and took an active part in the proceedings. Moore was elected president and Jones vice-president.

After subscribing for the shares mentioned, and in the month of September, 1905, an agreement was executed by Jones and Moore and the company (exhibit D) by which the company, for the consideration therein expressed, agreed to issue fully paid up and non-assessable shares to the said Jones and Moore, being the shares for which they had already subscribed, and it is in consequence of this agreement that they now seek to escape liability as contributories.

Under the terms of this agreement it is provided that, in consideration of the issue of such shares, Jones and Moore assign all their interest, right, and title in the Hicks Company business, including all the assets and goodwill of the said business, and all contracts existing, all leases of premises, all patent rights, and other exclusive privileges, held, owned, or enjoyed by them, and also the exclusive right to the use of the firm name of the Hicks Electric Company within the province of Manitoba, and for the consideration aforesaid the said Jones and Moore covenant and agree with the Manitoba company that during such period as the Manitoba company shall carry on business in the city of Winnipeg, the Manitoba company shall be furnished by them, or by the Ontario company, with drawings, tracings, forms, and full information respecting all machinery then being, or that might thereafter be, manufactured by the Ontario company, and that the Manitoba company should have the benefit in the provinces of Manitoba, Saskatchewan, Alberta, and British Columbia, of the business carried on by the Ontario company in the said provinces, including the benefit of all contracts being negotiated, together with the entire goodwill of the Ontario company in the said provinces, and they further covenant that the Ontario company will not engage in business in the said provinces, excepting with the Manitoba company. And they further agree, for the consideration aforesaid, forthwith to furnish to the Manitoba company a stock of electric motors, generators, welders, plates, and other supplies of the value of $5,000, and also electric plant and tools of the value of $1,500. The agreement provides for the payment by the Manitoba company

of the liabilities of the business and for the repayment to Jones and Moore of all moneys advanced by them, and also all liabilities assumed by them or by the Ontario company, which they, or either of them, or the Ontario company, may be called upon to pay in connection with said business, including the amount paid by them to acquire the said business.

These are all the considerations given by Messrs. Jones and Moore for the issue to them each of $20,000 of paid-up and non-assessable shares in the Jones and Moore Electric Company, Limited, of Manitoba.

The agreement (exhibit 3) under which Jones and Moore subscribed for the shares allotted to them is separate and distinct from the agreement (exhibit D); the former is not conditional upon the terms of the latter.

In the former agreement they respectively agree to subscribe for 200 shares each, and covenant, promise, and agree to pay up in such manner and at such times as may be lawfully determined, required, or demanded by the company. It is contended on behalf of Messrs. Jones and Moore that the shares for which they subscribed were intended to be taken subject to the terms of the agreement (exhibit D), and that they would not otherwise become shareholders. That contention cannot apply to the $7,000 originally subscribed by Jones, nor, I think, can it apply to the shares for which they subsequently subscribed. They subscribed for the shares prior to the execution of that agreement, and without any reference to it, and, although it is quite likely that Jones and Moore had concluded between themselves that they were not to be called upon for the payment of the shares for which they had subscribed, excepting as provided for in the agreement (exhibit D), yet such an understanding between themselves could not be binding upon the company or their creditors. This agreement, in my opinion, was a secret arrangement entered into between Messrs. Jones and Moore, and the manner in which it was prepared and introduced at the shareholders' meeting at which it is said to have been confirmed, is so unsatisfactory as to strengthen that opinion and to cast suspicion upon the honesty of the intention of the parties intended to be benefited by it. An agreement such as this should be given the widest publicity, instead of which it would appear that it was lightly passed over, evidently considered as of little importance, and signed without discussion. None of the

shareholders present seem clear as to whether or not it was read, and the shareholders other than Jones and Moore say that they did not know of its existence; that they understood that Jones and Moore were to pay for their shares in goods and cash; and this was corroborated by the fact that they did advance certain goods, which they assert were of the value of $6,500, and that similar representations were made to a person who subsequently, and on the strength of such representation, became, and is now, a creditor of the company.

Under the agreement (exhibit 3) Jones and Moore each became liable for $20,000 for the shares for which they subscribed in the company.

These shares must be paid for. The question is, can the agreement (exhibit D), be held as an accord and satisfaction. I think, from the authorities, that I cannot so hold.

In In re Heyford Co., Pell's Case, L. R. 8 Eq. 222, Pell's name was on the first list of shareholders. By the articles of association a certain agreement was set forth, which was thereby ratified and declared to be binding on the company, by which Pell agreed to sell to the company the goodwill and stock in trade of certain businesses carried on by him, and it was agreed that, as part of the consideration to be paid to Pell by the company, the company were to issue to Pell 1,500 shares of the nominal value of £20 each, which shares should be credited on the books of the company as fully paid up. A little over a year afterwards, the company were ordered to be wound up, and it was held by the Master of the Rolls that Pell was liable to be put on the list for all the shares, but was entitled to an inquiry as to what was the value of the property handed over by him to the company, and to be allowed such value, but no more, towards the payment of his shares. This was, however, reversed on appeal, and it was held that the shares issued by the company to Pell must be taken to have been issued in respect of their obligations under the agreement.

The case is distinguishable from the present one, because there was an agreement upon which the application for the issue of the shares was founded, which does not exist in the case under consideration.

It is urged on behalf of the liquidator and creditors that Messrs. Jones and Moore are not entitled to any credit for the goods supplied on their liability for the shares for

which they so subscribed, because of the fact that the agreement (exhibit D) is ultra vires of the company, that if payment be not made in cash it must be made in kind by the transfer, in præsenti, of property, or the render, in præsenti, of services: Drummond's Case, L. R. 4 Ch. 772.

A reference to the agreement (exhibit D) shews that the purchase of the business was made by the Jones and Moore Company, Limited, of Toronto. That company were the owners of the business at the time of the execution of the agreement (exhibit D). That latter agreement is made by Jones and Moore individually, and could not be binding upon the Jones and Moore Company, Limited, of Toronto, and, in the event of refusal by the latter company to consent to the agreement and be bound by it, what would be the consideration for the issue of the paid up shares? The only remedy the Jones and Moore Electric Company, Limited, of Manitoba, would have, would be an action in damages for breach of this agreement.

The agreement provides, however, for the furnishing by Jones and Moore to the Manitoba company forthwith of a stock of electric motors, generators, welders, plates, and other supplies, of the value of $5,000, and also electric plant and tools of the value of $1,500. This, it is urged by counsel for the liquidator and creditors, is also a consideration in futuro—that the goods had to be selected, and the failure to supply these goods would leave only a remedy in an action for damages, and that therefore such an agreement is ultra vires of the company.

In Pellatt's Case, L. R. 2 Ch. 527, Pellatt applied for shares as fully paid up, on his agreement to supply future goods. He was applying for shares conditionally. There was an agreement which led to his application, and the application was founded on it, and, as the agreement could not be carried out, he was not liable.

Jones and Moore were not applying for shares conditionally. If they had been, their position might have been different, as would also the position of creditors who became such by reason of the supposed large interest of men of good commercial standing, such as were Messrs. Jones and Moore. The public must be protected against transactions such as are manifest here.

After a careful consideration of the numerous cases cited by counsel on both sides, I am led to the conclusion

that Jones and Moore are each liable to the extent of $20,000, and to the costs of the application to add them as contributories.

MANITOBA.

FEBRUARY 11TH, 1908.

COURT OF APPEAL.

GORDON v. LEARY.

Principal and Agent—Sale of Goods to Agent—Liability of Principal for Price—Evidence—Inference from Undisputed Facts — Burden of Proof — Appeal — Reversal of Judgment.

Appeal by defendant from judgment of DUBUC, C.J., 6 W. L. R. 206.

The appeal was heard by HOWELL, C.J.A., PERDUE, J.A., PHIPPEN, J.A.

G. A. Elliott and M. G. Macneil, for defendant.

C. P. Fullerton, for plaintiffs.

HOWELL, C.J.A.:—I find from the evidence that no facts of importance are in dispute. From undisputed facts I only draw the conclusion that the business was not that of the defendant, or, at all events, the conclusions to be drawn do not establish the onus which was on the plaintiffs to shew that the business was really that of the defendant.

It seems to me that the utmost that was proved was that the defendant was to be responsible for the debts of another person. The business was carried on in the name of the son, and not of the defendant, and apparently the plaintiffs charged the goods as if the business was a continued one.

The appeal must be allowed with costs and the action dismissed with costs.

PERDUE, J.A.:—I think the learned Chief Justice of the King's Bench has erred in the inference he has drawn from

the established facts. I do not think these facts justified him in drawing the inference that George Leary owned the business. and that Schofield was merely managing it for him. The evidence shews that the credit was given on the representation by Schofield that George Leary would be responsible, and that he, Schofield, would see the plaintiffs paid, not on the ground that George Leary was the real proprietor of the business. The account was still continued under the name of J. G. Leary & Co. after Schofield went in as manager.

The goods were not charged to George Leary; they were charged to J. G. Leary & Co.

George Leary was not asked by the plaintiffs whether he was the proprietor or not. It is reasonable to suppose that George Leary got Schofield to take charge of the business and manage it in the interest of himself, George Leary, as the main creditor.

I think the appeal should be allowed with costs and the action dismissed with costs.

PHIPPEN, J.A.:—There is no dispute of fact. The question to be decided is as a matter of inference only from fact. Who composed the firm of J. G. Leary & Co. after 1st July, 1906?

The firm originally consisted of J. G. Leary alone, to the knowledge of the plaintiffs. It continued to the end to be carried on in this name. They now seek to hold George Leary liable for these goods as sold to him, and the onus is on the plaintiffs to shew that the business of J. G. Leary was transferred to his father, and that the goods charged to the firm were in fact sold to the father.

On 1st July the father, George Leary, was the principal creditor of the firm; Schofield was put in to manage the business. This was done with the consent both of the father and son, and apparently for the protection of the father, but there is no evidence warranting the holding that the business was in fact transferred to the father, as his business.

I think Schofield was really there for both parties as such, only to run the business. If so, the father could not be held liable for debts contracted in the name of J. G. Leary & Co., on the ground that George Leary was the firm. I think the judgment should be reversed.

MANITOBA.

DUBUC, C.J. FEBRUARY 13TH, 1908.

TRIAL.

HARRISON v. CARBERRY ELEVATOR CO.

Mortgage—Default — Mortgagees Taking Possession—What Constitutes Possession—Seizure of Crops—Severance—Claim under Seed Grain Chattel Mortgage—Validity.

Action to recover the value of 400 bushels of wheat, or thereabouts, taken by the defendants from a certain parcel of land of which the plaintiffs claimed to have been mortgagees in possession at the time.

F. L. Davis, for plaintiffs.

G. T. Barrett, for defendants.

DUBUC, C.J.:—The defendants contend that they took the wheat, after seizure of the same under a chattel mortgage given to them for the purchase price of seed grain by one Lawrence Robertson, who was then in occupation and possession of the land in question, and that the wheat was portion of the growing crops which had been raised by Robertson out of the said seed grain.

The lands in question were formerly owned by Lawrence Robertson, who, by deed dated 1st March, 1904, transferred the same to his wife and co-defendant, Mary Ann Robertson.

The plaintiffs claimed the grain under a mortgage dated 27th February, 1906, executed in their favour by Lawrence and Mary Ann Robertson. The seed grain chattel mortgage on the growing crops of Robertson, under which the defendants seized and took the wheat, is dated 2nd May, 1907.

The question to be determined is, whether the wheat in question was the property of the plaintiffs, or whether the defendants had the right, under their chattel mortgage, to seize and carry it away.

The defendants dispute the plaintiffs' claim that they were mortgagees in possession.

The facts were as follows. The plaintiffs, having received nothing on the amount secured by their mortgage,

proceeded to exercise the power of sale contained in the mortgage, and caused a notice to that effect dated 2nd July, 1907, to be served on Lawrence and Mary Ann Robertson, notifying them that unless payment of the mortgage money and interest be made within one calendar month from service of said notice on them, the plaintiffs would proceed to enter into possession of the mortgaged premises, but the evidence does not shew anything further done by them to enter into actual possession of the lands. On 20th September, while the crops were being harvested and marketed, the plaintiffs sent one Dougall McGibbon, as their agent, to stay with the Robertsons and look after the crops, and he remained there until about 18th November. It was on 12th November that the defendants went there, and, though forbidden by McGibbon to do so, took and carried away a certain quantity of wheat, which, when cleaned and made ready for market, amounted to 304½ bushels, realizing, at the then market price, the sum of $213.15.

The plaintiffs never told the Robertsons that they were actually taking possession of the lands, neither did McGibbon, while he was there, intimate to them that he was taking possession of the land on behalf of the plaintiffs. All that he said was that he had come to look after the crops. This cannot be held to constitute a taking of possession under the mortgage.

If the plaintiffs had actually entered into possession of the lands while the crops were growing, and before they were cut, they would, I think, have had a good claim on the grain in question: Lang v. Ontario Loan and Savings Co., 46 U. C. R. 114; In re Phillips, 16 Ch. D. 104. According to the evidence, he never took possession of the lands. But, to carry the point farther, it is shewn in evidence that, when McGibbon went to Robertson's house on 20th September, the whole of the wheat crop, except 5 or 6 acres, had already been cut and severed from the ground. It had, therefore, become a chattel, and, even if the plaintiffs had taken actual possession of the lands at that time, they would not have been entitled to the wheat crop already cut down. From this, it results the defendants were entitled to seize and take the wheat in question.

In my opinion, the action should be dismissed with costs.

MANITOBA.

FEBRUARY 17TH, 1908.

COURT OF APPEAL.

REX v. CHONEY.

Criminal Law—Murder — Evidence — Confession Obtained by Trick—Admissibility—Prisoner Deluded into Belief that he was Speaking to Agent of Solicitor—Other Persons Present Unknown to Prisoner—Privilege.

The prisoner was indicted for murder, and was tried at the autumn assizes, 1907, at Winnipeg, before PERDUE, J.A., and a jury. During the progress of the trial evidence was tendered on behalf of the Crown to be given by Joseph Lazodynski, Jacob Seel, and Anton Suladeski of an alleged confession said to have been made in the Winnipeg gaol by the prisoner to Lazodynski, in the hearing of Seel and Suladeski, on 4th July, 1907. The facts and circumstances surrounding the alleged confession were as follows:—

On the evening of 4th July the prisoner, Choney, was in the iron cage in the Winnipeg gaol. He was taken out of the cage and brought along the passage to a cell next to that of the governor's office situated in the east wing of the gaol. Lazodynski, a fellow prisoner, was then brought down from the upstairs portion of the gaol and locked in the cell with the prisoner. In the meantime Seel and Suladeski had secreted and placed themselves in a passage behind the cell, in such a position that they could hear very clearly through a square hole in the wall of the cell what the prisoner and Lazodynski were saying. There was no one in this cell but the prisoner and Lazodynski.

It appeared from the evidence that Lazodynski was told to go into the cell with Choney by one Mackenzie, a member of the provincial police force, who had been working up the case for the Crown. Seel and Suladeski, who were detectives, were sent in to overhear the conversation between the prisoner and Lazodynski, the whole plan being pre-arranged.

The prisoner was a foreigner, and unable to speak or understand English. The prisoner's solicitor had employed

Lazodynski, who had been paid for his services, on several occasions before 4th July, as his interpreter for the purpose of obtaining instructions from and advising the prisoner.

Mackenzie, the detective, had told Lazodynski on 4th July to speak to the prisoner in the cell and to get information about the case out of him. Lazodynski, therefore, asked the prisoner questions in his own language, without giving him any caution, and told him that the prisoner's solicitor had telephoned to him to tell him everything about the case. The prisoner thereupon answered in his own language, and the conversation was taken down by Seel and Suladeski, who understood that language, in their notebooks.

It was proved by Lazodynski that a document produced was signed by him. The document was as follows: "Choney says that he only told Joe Lazodynski anything about alleged murder and conversed with him on 4th July, 1907, about his case, because he was the interpreter between Choney and Mr. Blackwood. That I told Choney that Mr. Blackwood had telephoned me to tell Choney to tell me everything. This was untrue. Joe Lazodynski."

The prisoner had several times asked Lazodynski to help him, and Lazodynski had said, "How can I help you if I don't know anything," and the prisoner said, "I will tell you what it is."

The evidence of Lazodynski, Seel, and Suladeski was tendered at the trial by the Crown to prove the confession. Counsel for the prisoner objected to the evidence of Lazodynski being received as to the conversation with the accused in the cell on 4th July, referred to, on the ground of the fiduciary relationship existing between them. The accused thought it was going to benefit him, because he was asking this witness if he could not do something to help him, or do something for him.

PERDUE, J.A.:—I think the confession was not obtained in a proper manner. It was obtained by a trick and by reason of the position the witness had occupied in reference to the counsel who was acting for the accused. The signed paper put in raises much doubt in my mind whether the witness did not at the time actually represent that he was acting for Mr. Blackwood. I do not think the confession was given so freely and voluntarily as to be admissible in

a charge like this. He may have thought he was giving a message or explaining the facts to Mr. Blackwood.

Mr. Blackwood objected to Seel's and Suladeski's evidence being admitted, on the ground that the confession was obtained by a trick, trap or fraud.

The Court was then adjourned until the next day when the following judgment as to the admissibility of Seel's and Suladeski's evidence was given.

PERDUE, J.A.:—I regard the interview that took place between the accused and the witness Lazodynski as being, in effect, privileged. I believe the accused thought he was speaking to a messenger who came directly from his counsel; that the communication that passed between him and Lazodynski would be simply conveyed to the ears of his counsel. It is true that he was tricked into this interview, but what he said was not in the nature of a confession, but in the nature of a story or a statement to be made to his counsel. Now, for that reason, I ruled out the evidence of Lazodynski. Then, it transpired that evidence was sought to be put in of another person who had been concealed and had overheard the conversation between the accused and Lazodynski. At first it looked to me as if the authorities compelled me to receive that evidence. I did not see how that conversation could be put upon any higher ground than a conversation between the accused and his own solicitor, and it has been held in several of the cases, and it appears in all the leading works upon evidence, that where a conversation is overheard between a prisoner's counsel and himself, a person who has overheard that conversation may give evidence of it, although the counsel himself could not. That conversation would be privileged, so far as it took place between the counsel and the accused person, and it appeared to me at first that the evidence could only be excluded if it came under one of two headings. That is, first, where it was a privileged communication, and secondly, where it was given under any threat or promise held out to induce the accused to make the confession. But I think that the evidence should properly be excluded under the heading of privilege, for this reason. The evidence, no doubt, would properly have been excluded, if it had taken place between Mr. Blackwood and the accused. Then, the interpreter who was there was practically in the same position as Mr. Blackwood's clerk and in much the same

position as Mr. Blackwood himself. That being so, could evidence of a third party who overheard the conversation be received? If it were to Mr. Blackwood himself, I have no doubt he would have taken steps to have guarded the conversation so that no person would have been able to have given evidence in regard to it. This alleged conversation was in fact a trick. There was no communication from the prisoner's counsel, and he was falsely told that there was. I must take that view, reading that paper which the witness has signed, and taking the circumstances into account. I believe the accused was entrapped into going into this cell and having this conversation with the witness. Therefore, it was a trap, and the statement that the counsel was communicating with him is false. It is with considerable hesitation that I have arrived at this, and I know I am going beyond the English cases. The American authorities go farther than the English. In the last edition of Taylor on Evidence, the learned author leans towards the American authorities as taking the correct view of the case. So that I feel it is my duty to rule in favour of excluding the evidence of the alleged confession, in other words, making my ruling in favour of the accused. Of course, I shall reserve a case if the Crown desires it as to whether the evidence was admissible or not, and it can be considered later on the part of the Crown whether they will apply for a reserved case or not.

Subsequently, PERDUE, J.A., stated for the opinion of the Court the following question: "Assuming that the evidence thus excluded would have been material and might have resulted in a verdict of guilty, if allowed, was I right in excluding it?"

The case was heard by HOWELL, C.J.A., RICHARDS, J.A., PHIPPEN, J.A.

J. H. Leech, for the Crown.

H. P. Blackwood, for the prisoner.

HOWELL, C.J.A.:—As the learned Judge seems not to have been satisfied that the evidence was admissible, it seems to me that it should not be held that the facts proved created a legal presumption which bound the learned Judge to admit the evidence. The answer should be in the affirmative.

RICHARDS, J.A.:—On the finding of fact of the learned trial Judge, that the accused thought he was speaking to a messenger who came directly from his solicitor, I would answer his question in the affirmative. The accused's conversation with the person whom he reasonably supposed to be his solicitor's agent, is undoubtedly privileged. It is sought to draw a distinction between the evidence of that person and that of the two men who were in concealment. But, as the whole matter was the carrying out of one fraudulent design, I think that, as suggested by my brother Phippen, we should hold that the conversation was with all 3 of the proposed witnesses. If so, the privilege extends as against the evidence of all three.

PHIPPEN, J.A.:—I express no opinion on the admissibility of confession evidence obtained by trick.

Mr. Leech, very properly I think, admits that if, as found by the learned trial Judge, Lazodynski led the prisoner, when obtaining the statements, to believe that he was the accredited agent of prisoner's solicitor, he must be treated in his representative capacity, and that the evidence, on the ground of privilege, is, therefore, inadmissible. He argues the case as that of an overheard conversation between solicitor and client.

I do not think the same rule applies. As part of the trick, the listeners were placed where they could overhear what passed, whereupon the prisoner was led to believe he was discussing the matter in hand with one person alone, his solicitor's agent. As a matter of fact, he was talking with 3 persons, the supposed agent and 2 others, who were concealed.

I think we must treat the whole as an interview with several persons who had fraudulently adopted the character of solicitor's representatives. If so, we should, on the admitted principle, apply the cloak of privilege to what was heard by the listeners without as well as within the cell.

I think the evidence was properly rejected, and would answer the question in the affirmative.

MANITOBA.

MATHERS, J. FEBRUARY 17TH, 1908.

SINGLE COURT.

KELLY v. KELLY.

Receiver—Partnership Action—Appointment of Defendant, the Active Partner, as Manager and Receiver—Misconduct —Salary.

Application for the appointment of an interim receiver in a partnership action.

J. E. O'Connor and H. P. Blackwood, for plaintiffs.

T. L. Metcalfe and G. D. Minty, for defendant.

MATHERS, J.:—If the partnership has not already been dissolved, I am satisfied that it cannot go on, and that a judgment will be pronounced at the hearing dissolving it. Under such circumstances, the Court almost as a matter of course appoints a receiver. I think this is a case where a receiver should be appointed. The plaintiffs ask for the appointment of a trust company. The defendant opposes this application, and asks that he be appointed.

By common consent the entire business management of the partnership business has always been left to the defendant. He has managed it for many years with success. The partnership property, other than that in dispute in the action, consists of a stone-cutting plant, a rent-bearing business block in Bannatyne street, and a contract for the erection of the Winnipeg post office now about completed. The defendant is much more capable of winding up this contract and settling with sub-contractors than a third person, and it seems to me in the interest of all concerned that the matter should be left in his hands.

The practice of the court in such cases is thus stated in Kerr on Receivers, p. 95, and Lindley on Partnership, p. 583: "If the party actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court generally appoints him receiver and manager without salary."

I can see nothing in the evidence which would lead me to suppose that the defendant might not be trusted with the custody of the properties until the trial of the action. The plaintiffs seek to have it declared that certain investments made by the defendant in real estate, in his own name, were so made on partnership account, and to compel him to account to the partnership therefor. It may be that the defendant has so conducted these real estate transactions as to make him accountable therefor to the firm—that is the question to be tried. There was, however, no concealment by the defendant of his real estate dealings, all of which were entered in the partnership books. It is also charged that he speculated in stocks with the firm moneys. It does not appear that he drew out of the firm moneys for that purpose more than his share of the firm profits would have been, had there been a division. It is also charged that he received upwards of $6,000 of firm moneys from the Canadian Pacific Railway Company, which he appropriated to his own use. He swears that when he received this money he believed it to be his own. When this action was brought, upon the advice of his solicitors he voluntarily disclosed this transaction and submits to account for this money. Although his explanation of the reasons which led him to believe these moneys were his own is not entirely convincing, yet his voluntary submission to account for a transaction that he might have absolutely concealed, had he chosen to do so, goes a long way to support his bona fides. As before stated, I can see nothing in any of these transactions from which it could be reasonably inferred that the defendant could not be trusted to honestly discharge the duties of receiver and manager until the trial of the action.

The question is, what is most in the interest of all concerned, and I have no hesitation in saying that I think the appointment of the defendant as receiver and manager in the meantime will best conserve the interest of the partnership.

It was stated during the argument that free access to the partnership books was necessary to the proper conduct of the plaintiffs' case. It should be a condition of the appointment that all of the partnership books not necessary to the conduct of the business of the receivership be deposited in court, and that free access to all other books be allowed at all reasonable business hours to the plaintiffs,

their agents, solicitors, and counsel. Conduct by the receiver contrary to the spirit of this condition would no doubt be dealt with by the Court in such a way as to secure to the plaintiffs their rights.

There will be an order appointing the defendant receiver and manager until the trial, without salary. The condition as to the books above mentioned will be a term of the order. The defendant will first have to give security, but before fixing the amount the matter had better be spoken to.

Costs of this motion will be costs in the cause.

MANITOBA.

MATHERS, J. FEBRUARY 17TH, 1908.

TRIAL.

BURLINGTON CANNING CO. v. CAMPBELL.

Sale of Goods—Action for Price—Contract—Unascertained Goods—Sale by Description — Sales of Goods Act—Deducton from Price—Goods not of Description Ordered—Evidence—Acceptance and Resale of Goods—Quality—Waiver — Time for Objection — Condition Precedent — Order of Judge Permitting Sale—Counterclaim—Delay in Shipping—Breach of Warranty—Costs.

Action to recover $6,075.75, the price of a large quantity of canned goods supplied by plaintiffs to defendants.

C. P. Fullerton and J. B. Coyne, for plaintiffs.

C. P. Wilson and W. C. Hamilton, for defendants.

MATHERS, J.:—The contract of sale was made verbally by the president of the plaintiff company with the defendants on or about 16th May, 1904, and was afterwards reduced to writing by Tees & Persse, the plaintiffs' agents at Winnipeg. The agreement was that the defendants would take from the plaintiffs their entire requirement of canned goods, 1904 pack, at prices 5 per cent. less than those charged for similar goods by the Consolidated Company. The discount was to be taken off the face of each invoice, and

drafts were to be made on the same terms and in the same manner as in practice by the Consolidated Company. The plaintiffs were not to be responsible for any adverse dispensations of Providence, such as failure of crop, fire, etc. Attached to this letter was a detailed list of approximate quantities.

The defendants gave orders from time to time, through Tees & Persse, and a large quantity of goods was shipped by the plaintiffs to the defendants, which was accepted and paid for by the defendants without objection.

The defendants set up in their defence that the price charged was in excess of that charged by the Consolidated Company, in that that company allowed the discount on the cost of carriage to Winnipeg as well as on the price of the goods, and the plaintiffs had not done so. The plaintiffs' counsel conceded this point, so that all that remains is to calculate the amount of this deduction.

The only other defences raised are as to the plums and the pork and beans, both of which the defendants say were not of the description ordered, and that they refused to accept them, and notified the plaintiffs of such refusal.

The plums named in the list of approximate quantities are Green Gages, Lombards, and Damsons. What the plaintiffs supplied were Green Gages, Lombards, and Reine Claude.

The only reason for refusing to accept the plums put forward in the defence is, that they are put up in heavy syrup instead of light syrup.

The contract is silent as to the kind of syrup in which the plums are to be packed, and nothing was said on this point at the time the contract was being entered into. Much the greater proportion of plums sold in this market is in light syrup. The plaintiffs' president was not aware of this fact, and the plums packed by the plaintiffs are almost entirely of heavy syrup. Mr. Tees, the plaintiffs' agent, who was present when the contract was made, knew that light syrup plums was the kind most saleable in this market. He and the defendants seem to have taken it for granted that light syrup plums would be supplied, and the necessity of more particularly specifying the kind does not seem to have occurred to either of them. It is said that because Tees knew the kind required, therefore the plaintiffs must be charged with that knowledge. I cannot, however, accede to this proposition. If the agreement

had been made with Tees, the case might stand differently. The bargain, however, was made with Mr. Fisher, the plaintiffs' president, and is alleged to have been so made in the defence. It does not appear that the relationship of principal and agent existed between the plaintiffs and Tees & Persse until after the contract was entered into. But, in any event, I could not hold that because Tees was present while Mr. Fisher and the defendants were negotiating the terms of an agreement, the plaintiffs are to be fixed with a knowledge of all that was in the mind of Mr. Tees.

Mr. Campbell says that before he left for the old country on 18th June he spoke to Tees about what the defendants wanted, viz., Marrowfat peas and light syrup plums, and he inferred from Tees that he had told Fisher, when here, the grades of goods required. Fisher says that he heard nothing about light syrup plums being required until he received a letter from the defendants dated 22nd November, at which time the last of the plums had been shipped. The correspondence which subsequently took place does not point to the conclusion that the plaintiffs had been previously informed that light syrup plums were required. On 22nd November the defendants write to the plaintiffs: "Kindly ship us light syrup plums and Flemish Beauty pears for the balance of these goods which we have on order, as we find you have already shipped us sufficient of heavy syrup plums and Bartlett pears to last us for some time." It is pointed out that Mr. Campbell did not write this letter. He was, however, there when it was written, evidently by some person in authority, and I think the plaintiffs are entitled to the benefit of any fair inference from its contents. On 21st December Mr. Tees wrote the plaintiffs: "Mr. Campbell tells us . . . that he has written you about plums which are not the goods he expected. You have shipped plums in heavy syrup, but what they want is light syrup," And he adds: "Never dreamt for a moment that you would put them up in this way."

Neither of these letters is written in the terms in which it would have been expressed by a person who had had a previous definite arrangement as to the kind of plums to be supplied. Besides, it is utterly improbable that the plaintiffs would manufacture and ship heavy syrup plums if they had been given to understand that light syrup plums alone would be accepted. I think Mr. Campbell is mistaken as to his alleged conversation with Mr. Tees, and I accept Mr.

Fisher's statement that the first intimation the plaintiffs received as to the kind of syrup the plums were to be packed in was contained in the defendants' letter of 22nd November, above referred to.

I am of opinion, therefore, that the defendants had no right to reject these plums on the ground alleged in the defence.

But did the defendants reject the plums? On 21st December Tees wrote the plaintiffs: "Campbell will not take them, and you had better instruct us what to do in the matter." To this letter the plaintiffs made no reply. On 17th January, 1905, the defendants wrote to Tees & Persse: "We wish you would advise them" (the plaintiffs) "that, as they took it upon themselves to ship these higher priced goods, without first consulting us, they must stand the difference in the price. We have considered this matter fully, and, if there was any way of letting them out without loss to ourselves, we would gladly help them out, but we wish you to understand that our competitors here are all selling light syrup goods at prices which we cannot touch, and we are going to meet their prices, as we do not intend to sit by and see them doing the business."

If the defendants had not accepted the goods, they would have had no right to sell them at any price, except under circumstances that do not arise in this case.

On 13th March, 1905, the defendants wrote to the plaintiffs' solicitors in Hamilton, Ontario, from whom they had received a letter: "With regard to plums shipped. All our goods were ordered light syrup, they shipped us a different line of goods and charged us a higher price. Had we received the proper goods, we could have had fully one quarter of them sold by this time; as it is we have had to buy light syrup goods to fill orders, and their goods are still in stock. On these we not only claim the difference between the price on light syrup goods and the heavy syrup, but also our loss through not being able to fill orders and having to buy goods here at a profit to the other merchants."

On 30th March, 1905, the defendants wrote to the plaintiffs: "The heavy syrup plums you substituted for light syrup goods . . . we refuse to take, and they are . . . here to order without insurance, and storage will be charged from April 1st."

The letters of 17th January and 13th March were clearly not a rejection of the goods, but rather conveyed an intima-

tion that they were accepting them on terms fixed by themselves. If they had adhered to their original attitude, as stated in Tees & Persse's letter of 21st December, there would be very little doubt, I think, that they had rejected the goods. Their subsequent letters of 17th January and 13th March plainly shew, however, that that attitude was not adhered to, and their attempted rejection on 30th March was entirely too late.

If, however, there was any doubt on the question, it is removed by their dealings with the goods. Both before and after 30th March they treated them as their own, and from time to time sold large quantities. Apart from everything else, they must be deemed, because of their dealing with these plums, to have accepted them: Sales of Goods Act, sec. 35; Chapman v. Norton, 11 M. & W. 534.

It is, however, objected that, as the contract called for Damson plums, and they have supplied "Reine Claude," they cannot recover upon the contract. I take it that is correct, and that the plaintiffs can only succeed on the implied contract to pay for the goods accepted in lieu of those contracted for. The defendants accepted the Reine Claude plums without ever once objecting that they were not the kind ordered, and they are too late now to object. The action is for goods sold and delivered, and under a claim so worded the plaintiffs may recover the value of the goods accepted: Bullen & Leake, 3rd ed., p. 38. No amendment is, therefore, necessary. If an amendment were necessary, I would not hesitate to allow it.

It is further objected that the pears bargained for were Flemish Beauty pears, whereas those sent were Bartlett pears. The contract is silent as to the variety of pears to be sent. The complaint is not that the goods sent were not a superior article, but that they were too good and too expensive for this market.

Without reviewing the evidence bearing upon this part of the case, I may say that what I have said with regard to the heavy syrup plums being within the terms of the contract, and the defendants dealing with them in such a way as to be deemed to have accepted them, applies with equal force to the Bartlett pears. All these goods had arrived on 14th December, and it was not until 17th January that any complaint was made. Even then, the defendants did not refuse to accept them, but only claimed the difference in price. It was not until 30th March that an

attempt was made to reject these pears. They had, however, commencing with November, during each intervening month, dealt with them as their own, and sold quantities of them. Even after the attempted rejection, they still continued to deal with them in a manner utterly inconsistent with the attitude assumed in their letter of rejection. To my mind, the defendants have clearly deprived themselves of the right now to refuse payment for these pears.

As to the pork and beans, the defence is that they were not up to the standard of quality mentioned in the contract, and were, for that reason, not accepted by the defendants.

The letter accompanying the contract stated that the goods were "to be carefully packed and guaranteed equal in quality to any of the well-known standard brands." I must find, upon the evidence, that the pork and beans shipped were not equal in quality to any of the well-known standard brands. I take it to be clear law that where there is a stipulation as to the quality that future or unascertained goods shall possess when ascertained, such stipulation is not a warranty, but is part of the description of the goods. It is therefore a condition precedent, the breach of which entitles the purchaser to refuse to accept: Lewis v. Barrie, 14 Man. L. R. 32; Varley v. Whipp, [1900] 1 Q. B. 513; Benjamin on Sales, p. 1002. The defendants had the right to reject the pork and beans. The question is, did they do so? These goods arrived about the middle of December, and on the 29th of that month the defendants complained to Tees & Persse that a number of tins had been returned by their customers because of being swelled. Tees & Persse on the same day wrote the plaintiffs and forwarded one of the tins. They informed the plaintiffs that the tin forwarded was one of a number that had been returned by the defendants' customers on account of being swelled. They asked the plaintiffs to let them know immediately what was to be done with these goods. The plaintiffs replied on 3rd January, 1905, to Tees & Persse, stating that they did not expect to be paid for spoiled goods, and would make good any such loss if claims were presented within a reasonable time. On 9th January Tees & Persse wrote the plaintiffs that the defendants had that day told them that they intended to refuse the whole shipment. On 18th January Tees & Persse wrote to the plaintiffs again reiterating the defendants' refusal to keep the goods, not only because of the swells, but

because there was something the matter with the flavour of the goods; and on 19th January the defendants wrote the plaintiffs to the same effect, and asked that the goods be taken off their hands. The only reasonable way of ascertaining whether or not these goods were of the quality guaranteed was by placing them in the hands of their customers for use in the ordinary course of their business. The quality of the goods could not be ascertained without opening the tins, and it was not practicable to open such a number of the tins as would enable the purchasers to arrive at a reasonable conclusion as to the quality of the bulk, as the opened tins would be unsaleable.

Up to 9th January, 1905, when the defendants definitely announced their refusal to accept the goods, I do not think they had done anything to preclude them from so refusing.

On 9th July, 1906, an order was obtained from a Judge permitting the defendants to sell the goods in the ordinary course of their business without prejudice to the rights of the parties to this action. Before this order was obtained, and after their repeated refusals to accept, the defendants had sold a large quantity of the goods. They appear to have continued to deal with them after their refusal just as they had done before. Even after this action was brought, they still continued to deal with the goods for 7 months, selling quantities of them each month before applying for the order above mentioned. It was attempted. to be shewn that this course of dealing was pursuant to an arrangement to that effect with Tees & Persse. The evidence falls short of establishing any such arrangement. But, even if it went the full length contended for, I could not hold that the making of such an arrangement was within the scope of Tees & Persse's general authority, and no attempt was made to prove a specific authority for that purpose. A perusal of the correspondence convinces me that it was not the understanding of either Tees & Persse, or the plaintiffs, that the former had power to bind the latter by any such agreement.

Section 35 of the Sales of Goods Act provides that "the buyer is deemed to have accepted the goods . . . when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller." It was contended on behalf of the defendants that, as this action refers to an acceptance in performance of the contract, and as the defendants dealt with the goods in

the manner shewn, relying upon the suggested arrangement with Tees & Persse, it could not be held that the defendants, by such dealing, intended to accept the goods in performance of the contract. I do not think anything turns upon what the defendants had in their minds. The section makes the act, and not the mental attitude of the defendant accompanying the act, the test of acceptance or non-acceptance. The plaintiffs had refused to acquiesce in the defendants' rejection of the goods. The plaintiffs' attitude amounted to a continuous offer of the goods to the defendants, and they had the right, therefore, at any time to reconsider their refusal and to accept them. The case is completely covered by such cases as Parker v. Palmer, 4 B. & Ad. 387; Chapman v. Morton, 11 M. & W. 534; and Harvey v. Groves, 15 C. B. 667.

In my opinion, the defendants have so dealt with the pork and beans that they must be deemed to have accepted them. The defendants had the right to waive the condition as to quality and treat it as a warranty under sec. 13 of the Act, and this is the course they must be held to have adopted.

It is true that under such circumstances the vendors' right to recover the value of the goods is not upon the original contract, but upon an implied contract to pay the value of the goods which have been accepted: Cunliffe v. Harrison, 6 Ex. 903; Hart v. Mills, 15 M. & W. 85; and per Parke, J., in Read v. Rann, 10 B. & C. at p. 441. I cannot agree, however, with counsel for the defendants that in order to succeed upon such an implied contract there must be an amendment of the statement of claim. The claim is for the goods sold and delivered, and, as I have already pointed out, when dealing with the question of plums and pears, under it the plaintiffs can recover upon the implied contract which arises from the defendants' acceptance of the goods.

The defendants by their counterclaim repeat the allegations in their statement of defence, and, amongst other things, allege that "there was very unreasonable delay on the part of the plaintiffs in shipping goods of the kinds mentioned in sub-sec. (b) of the schedule thereto," in consequence of which the defendants suffered damage. The only goods mentioned in the schedule, concerning which it was attempted to prove delay, were peas and corn. All other claims based upon the counterclaim, with the exception of that as to pork and beans, have been already dealt with by me, or were abandoned.

The first order for peas was contained in a letter from Tees & Persse to the plaintiffs dated 15th August, 1904. That order was for 350 cases of peas and 250 cases red raspberries. All parties understood that the peas and corn were to be packed, not by the plaintiffs, but by another company operating at Bloomfield, a place about 150 miles from the plaintiffs' factory, and that all the other lines were to be packed by the plaintiffs at Burlington. The shipment of a car made up of goods from each of these points would involve the plaintiffs in considerable additional expense. The written contract is silent as to the shipment of mixed cars, but the defendants offered evidence, which I admitted, subject to objection, tending to shew a verbal understanding to that effect. I do not think the written contract can be added to in this way, and the defendants must rely upon the written contract. It follows, I think, that the plaintiffs were not bound to fill this order for peas.

On 14th September, 1904, Tees & Persse wrote to the plaintiffs, requesting them to rush a car of peas from Bloomfield. The first peas were received by the defendants on 2nd December, and the remainder on 17th December. The Bloomfield correspondence put in shews that some peas at least were canned prior to 19th August. It also shews that the defendants' order for peas of 14th September was placed with the Bloomfield company on or prior to 20th September. On that day the latter company wrote to Mr. Fisher, the plaintiffs' president: "Re car peas for Winnipeg. We telephoned yesterday to Rathbun to rush car of boxes for your goods, and as soon as we get them we will get them labelled and shipped." The evidence further shews that the Bloomfield Company were requested to forward these goods as soon as possible. On 2nd November the Bloomfield Company wrote to the plaintiffs: "Shipped you car corn and peas today—Winnipeg 2 cars will, I expect, leave to-morrow." The Winnipeg cars do not appear to have been shipped for a few days after this, and they eventually arrived in Winnipeg on 2nd December.

Corn canning begins usually about the middle of September, but something depends on the season. There is nothing to shew when canning began in 1904. On 22nd September the defendants gave their first order for corn, and the first car of corn was shipped from Bloomfield with the first

car of peas, both arriving in Winnipeg on the same day, viz., 2nd December.

In the meantime the defendants were out of these lines, and Tees & Persse kept repeatedly urging the plaintiffs to have peas and corn shipped. Mr. Fisher stated in his evidence that the reason, and the only reason, why the peas were not shipped promptly, was because routing instructions had not been given. He subsequently, on being shewn some of the correspondence that passed, admitted that that was not the reason, but suggested no other. He further stated that he had no explanation to offer as to why peas were not prompt shipment. The order for peas was in the hands of the Bloomfield company on 20th September. I infer that a week would be a reasonable time to ship after the receipt of the order, and 4 weeks thereafter to reach Winnipeg. Had the peas been sent forward with reasonable promptness, they would have reached Winnipeg on 27th October, instead of on 2nd December. I think the plaintiffs must be held responsible for any loss resulting to the defendants because of their not having those peas during that period.

As to corn the case stands somewhat differently. The onus was upon the defendants to shew that it was not shipped in a reasonable time after the receipt of the order of 22nd September. Where no time is specified within which the seller is to send the goods to the buyer, he must do so in a reasonable time: Sales of Goods Act, sec. 29. Reasonable time is said to be "as much time as is necessary under the circumstances to do conveniently what the contract requires should be done." In their letter of 14th September Tees & Persse say: "When will Bloomfield be packing corn? We suppose that is not ready yet." I can see no evidence on which I could possibly base a finding that the corn was not shipped as soon as the circumstances surrounding this case would permit. I cannot infer that there was unreasonable delay from the mere fact that the goods were not shipped, and I can see nothing else in the evidence.

As far as corn is concerned, the defendants' counterclaim fails.

There will be judgment for the plaintiffs for the amount of the claim sued upon, less the discount on the freight paid by the defendants in respect of the goods sued for.

There will be judgment for the defendants upon the counterclaim, for delay in shipping peas and for breach of warranty as to the quality of the pork and beans, and a

reference to the Master to take an account of the damage arising from such breach of warranty, and by reason of the defendants not having been supplied by the plaintiffs with peas between 27th October and 2nd December, 1904, as set out in the defendants' counterclaim, and particulars thereof delivered. With these general directions the parties may be able to agree upon the terms of a judgment—if not, the matter may be spoken to.

The plaintiffs are entitled to the costs of suit, including such portion of the counterclaim as does not relate to the quality of the pork and beans and delay in shipping peas.

The defendants are entitled to the costs of counterclaim, except the portion thereof above mentioned.

MANITOBA.

CAMERON, J. FEBRUARY 24TH, 1908.

TRIAL.

HANNAH v. GRAHAM.

Vendor and Purchaser—Contract for Sale of Land—Action by Vendors for Specific Performance—Defence of Fraud—Misrepresentations as to Quality and Value of Land—Caveat Emptor.

Action by vendor for specific performance of a contract for the sale of land.

W. L. McLaws and H. E. Robison, for plaintiff.

J. E. Robertson and P. C. Locke, for defendant.

CAMERON, J.:—This is the third case I have had before me lately, involving practically the same conditions. When the real estate market is advancing, you can always look for actions for specific performance, and when the values fall you can look for actions to rescind contracts, alleging fraud. This transaction arose while the market was in a state of transition. The action was commenced for specific performance, and the defence charges fraud. Values had fallen in

the meantime. The action is set down for trial by the defendant.

On looking at the record it struck me, at the first, that this defence was objectionable in point of law, and that under the authorities it could not stand. We have it set out here as fraudulent on the part of the plaintiff that he stated, in the first place, that the land consisted of a black sandy loam, 18 to 20 inches thick, with a clay bottom under the top soil; secondly, that it was land free from white sand; and, thirdly, that the land was worth $15 per acre. I think it clear that these last two statements come within the rule of simplex commendatio, while the first is susceptible of the same construction. See the cases collected in Kerr on Fraud and Mistake, pp. 46, 47.

The fact of the matter is that Graham, the defendant in this case, entered into a bargain in the course of an afternoon and evening with a man he had never seen before. He took his word, according to his own evidence, as to the quality of this land, without inspection.

If he chooses to do that, and chooses to rush into bargains with his eyes wide open, and bind himself, he has no right to come to this Court and ask for relief from the consequences of his own negligence.

But is it the fact that he relied only on what the plaintiff said? No. Because he got this land from another real estate agent, "The Golden West," where the agent refused apparently to commit himself to a valuation, a fact which might well have put him on his guard. He then took the description to Mr. Rooney, and the two of them consulted a map on the subject, and, according to Mr. Graham's own story, Mr. Rooney (at one time an owner of the property) gave him his valuation and idea of the quality of the land, and this before there was any connection of agency between Mr. Rooney and the plaintiff.

So it was not true, on Graham's own evidence, that he relied solely upon the plaintiff's statements. We have, therefore, the case of this man doing something which he says he never did before, purchasing property without inspecting it. To say that he can now come into this Court and have the transaction ripped up, is absurd, and this Court is pursuing a proper course if it denies relief in a case where it was open to a man to safeguard his interests and he deliberately avoided doing so.

This Court is no place for a man to come, to have his contract changed or rescinded to suit himself. I think the principles upon which I am acting are perfectly sound and in the interests of public policy. If they are adhered to, we shall then be spared the spectacle of witnesses coming before us, as they have the two days of this trial, giving the most conflicting and contradictory evidence relating to the quality of the soil and other facts such as are in question in this case.

A very eminent Judge of the Supreme Court of the United States says: "Where the means of knowledge are at hand, and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief:" Field, J., in Slaughter v. Garson, 13 Wall (U. S.) 379.

This doctrine, it has been forcibly stated, is not based upon any consideration for the party who has been guilty of the false representations, but upon the ground that public policy requires that persons shall be required to exercise at least ordinary prudence in their business dealings, instead of called upon the Courts to relieve them from the consequences of their own inattention and negligence.

It is expressly laid down in Attwood v. Small, 6 Cl. & F. 232 (a case which received great consideration in the House of Lords), that if a person choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him, he cannot be heard to say he was deceived by the vendor's misrepresentations, the rule being caveat emptor.

I am aware that a defence of fraud may be set up in a specific performance case that might perhaps not go so far as would justify the setting aside or the rescinding of the contract, but under the authorities in Fry, p. 295, I think I am amply justified in invoking the doctrine of caveat emptor in this particular case.

I, therefore, am of the opinion, apart altogether from the evidence given on behalf of the plaintiff in reply, that the defendant could not have succeeded on his own statement of defence, and upon the evidence as it was given in support thereof. After hearing the plaintiff's evidence, which

strengthened my view, my opinion inclines to adopt, and I do adopt, the evidence of the plaintiff and the evidence supporting his version of the facts both as to the negotiations held on the evening of 8th March, the quality of the soil, and the other facts in issue, as against the evidence put forward for the defence.

My judgment, therefore, is that the plaintiff is entitled to succeed, that the prayer of the statement of claim for specific performance be granted, together with the costs of the action.

MANITOBA.

FEBRUARY 25TH, 1908.

COURT OF APPEAL.

SMYTHE v. MILLS.

Deceit — Action for — Grounds of Action — Agreement for Lease—Representation as to Time of Getting Possession —Falsity—Concealment of Existing Lease—Demurrer—Amendment—Terms—Costs.

Appeal by plaintiff from decision of HOWELL, C.J.A.

The action was brought to recover damages for deceit. The plaintiff, who was a druggist, entered into negotiations with the defendant to rent from him a store.

Defendant represented to plaintiff that the store would be vacated on 31st October, 1905, and, on the faith of such representation, plaintiff agreed with defendant to rent the same from 1st November, 1905. Plaintiff purchased a stock of drugs and also expended some moneys on the faith of the defendant's representations that the store would be vacant on 1st November, 1905.

It subsequently transpired that the defendant had granted a lease of the premises to Colcleugh & Co. for a year, which would not expire until 1st June, 1906, under which lease Colcleugh & Co. were in possession, and plaintiff was unable to occupy the store. Plaintiff claimed $1,000 damages.

Defendant demurred to the statment of claim (setting out the above facts) as disclosing no cause of action, contending that there was no consideration for the agreement mentioned, or the warranty referred to in the statement of claim; that the agreement, or warranty, if any, was void from vagueness or uncertainty, and defendant pleaded the Statute of Frauds.

The demurrer was argued before HOWELL, C.J.A., who held that the case being laid entirely in deceit, the representation of a matter which was alleged would take place in the future was not such a representation as would lay the foundation for an action of deceit, and he gave judgment for defendant on the demurrer.

H. W. H. Knott, for plaintiff.

H. A. Burbidge, for defendant.

The COURT (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), held that the statement of claim should have specifically alleged the concealment of the lease as the ground of action, the representation as to what would take place in the future not being a ground for an action of deceit.

On application of the plaintiff's counsel leave to amend was given in the following terms:—

On payment by plaintiff of the costs of the appeal, to be paid within two weeks after taxation, the plaintiff to be at liberty to amend, as he may be advised: such amendment to be made within two weeks after the payment of such costs, and the judgment to be varied accordingly. The costs up to and including the hearing to be costs to defendant in any event of the cause. If plaintiff fail to pay such costs within the time allowed for payment, or to amend within the time allowed for amendment, the plaintiff's action to be dismissed with costs, including costs of the appeal.

MANITOBA.

MATHERS, J. FEBRUARY 27TH, 1908.

CHAMBERS.

RE IDEAL FURNISHING CO.

STEWART-McDONALD CO.'S CASE.

Company — Winding-up — Seizure of Goods of Company under Execution after Notice of Presentation of Petition Served—Lien of Execution Creditor—Winding-up Act—Change in Wording by R. S. C. 1906—Effect of.

A petition for the winding up of the Ideal Furnishing Co. was filed on 31st January, 1908, and notice of presentation

thereof served. On 5th February the sheriff made a seizure of the goods of the company under a writ of execution issued upon a judgment recovered by the Stewart-McDonald Co. against the Ideal Furnishing Co. On 6th February the winding-up order was made. The execution creditors claimed the right to proceed under their execution to realize their judgment.

H. Phillipps, for the Stewart-McDonald Co.

R. M. Dennistoun, K.C., for the liquidator.

A. E. Hoskin, for creditors.

G. D. Minty, for the Traders Bank.

W. A. S. Sweatman, for shareholders.

MATHERS, J.:—There is no doubt but that under sec. 84 of the Winding-up Act, R. S. C. 1906 ch. 144, as it stood before the late revision, the claim of the execution creditor would not be tenable. That section made it abundantly clear that an execution creditor acquired no priority unless the money realized by the sheriff under his execution had been actually paid over before the winding-up of the business of the company had commenced. What was formally one section is in the revision divided into two sub-sections, the first of which provides, generally, that no lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company. The second sub-section provides that no lien or privilege shall be created upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company by the filing or registering of any memorial, or minutes of judgment, or by the issue or making of any attachment, or garnishing order, or other process or preceeding, if before the payment over to the plaintiff of the moneys actually levied, paid, or received under such writ, memorial, minute, attachment, garnishee order, or other process or proceeding, the winding-up of the business of the company has commenced; provided that this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order, or other process or proceeding was issued.

The Revised Statutes of Canada, 1906, Interpretation Act, sec. 7, sub-sec. 1, provides that the Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former Acts; and sub-sec. 2 provides that if upon any point the provisions of the Revised Statutes are not in effect the same as those for which they are substituted, then the provisions of the Revised Statutes shall prevail.

I have come to the conclusion, with some hesitation, that sub-sec. 1 of sec. 84 of the Winding-up Act, in so far as applicable to the facts of this case, is not different in effect from the former sections. This sub-section, standing alone, and taken in its literal sense, would mean that a writ of execution could never become a lien on the goods of a company, whether the company were being wound up or not. The Dominion Parliament would have no jurisdiction to pass such an enactment except with reference to a company that was being wound up, or was otherwise brought within its insolvency jurisdiction. This sub-section must, therefore, be construed as applicable only to a company in process of winding-up.

Under sec. 5 the winding-up of the business of the company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up. If this section be read in connection with sub-sec. 1, as I think it must, a writ of execution cannot become a lien on the goods of the company after the service of the notice of presentation of the winding-up petition. In this case the execution was placed in the sheriff's hands on 5th February. Before that the notice of presentation of the petition had been served.

I must, therefore, hold that the judgment is not a lien or privilege upon the goods of the company.

It is difficult to say what would now be the result in a case where the sheriff had sold the goods of the company and had the proceeds of sale in his hands when notice of the petition was served. Under the Act as it stood before the revision, the money would become the property of the liquidator. Under the Act as it now stands, to obtain that result, sub-sec. 2 would have to be read into sub-sec. 1. Whether or not that should be done, I am not called upon at present to decide.

In view of the uncertainty which the change in the form of the statute has given rise to, I think there should be no costs against the execution creditors.

MANITOBA.

MATHERS, J. FEBRUARY 28TH, 1908.

CHAMBERS.

RE BENNETTO AND CITY OF WINNIPEG.

Arbitration and Award—Arbitrators Failing to Agree—No Award Made—Lapse of Time for Making—Failure to Extend — Arbitrator Functus Officio — Winnipeg City Charter—Claim for Compensation for Injury to Land—Notice to Appoint Arbitrator—City Corporation—Non-compliance—Application to County Court Judge—Prohibition.

Motion by the city corporation for an order prohibiting the senior Judge of the County Court of Winnipeg from appointing an arbitrator on behalf of the city.

Bennetto alleged that his property had been damaged by the construction of the Main street subway. The claim was based on city by-law No. 2790, as confirmed by 3 & 4 Edw. VII. ch. 64 (Man.)

On 20th October, 1904, Bennetto appointed James Scott as his arbitrator, and on 14th November, 1904, the city council by by-law appointed R. T. Riley as the city's arbitrator. These two subsequently appointed James McDermaid as third arbitrator.

The arbitrators so appointed proceeded with the reference, and on 27th May, 1905, the taking of evidence being concluded, they heard argument of counsel on behalf of the parties concerned, and reserved their decision.

Section 812 of the charter provides that the award shall be made within 3 months after the appointment of the third arbitrator, unless the parties to the arbitration agree to an extension of the time. The time so limited was, by agreement, extended more than once, but it was admitted that the time fixed by the last extension had long since expired.

The arbitrators were not able to agree upon an award, and none was ever made.

After the time within which the arbitrators were to make their award had expired without any award having been made, Bennetto on 17th June, 1907, served upon the mayor of the city, pursuant to sec. 802 of the charter, a notice re-appointing James Scott his arbitrator, and calling upon the city corporation to appoint an arbitrator on their behalf. The mayor did not appoint an arbitrator within 7 days from receipt of this notice, or at any other time, and on 20th July, 1907, the junior Judge of the County Court of Winnipeg, upon the application of Bennetto, issued his summons to the city corporation to shew cause why the County Court of Winnipeg should not appoint an arbitrator for and on behalf of the city. Upon the return of this summons it was adjourned to come before the senior Judge.

H. A. Robson and J. Auld, for the city corporation.

J. E. O'Connor and H. P. Blackwood, for Bennetto.

MATHERS, J.:—Section 805 of the charter provides that if the mayor, whether from want of authority or otherwise, omit to name an arbitrator within 7 days after receiving notice to do so, a Judge of the County Court of Winnipeg shall, on the application of either party, nominate as an arbitrator a fit person resident without the limits of the city to act for the party failing to appoint.

The position taken by the city corporation is, that, having appointed R. T. Riley as their arbitrator by by-law on 14th November, 1904, and as that by-law has never been repealed, he is still the arbitrator for the city. If that is the true position of the matter, then clearly the city corporation are not in default under sec. 805, and the County Court Judge would have no jurisdiction.

It is clear law, I think, that an arbitrator's authority ceases as soon as he has made an award, or as soon as the time fixed, whether by consent or otherwise, within which he shall make his award, has expired: Russell on Arbitration, p. 111; 2 Am. & Eng. Encyc. of Law, p. 693; 3 Cyc. 631; Ruthven v. Ruthven, 8 U. C. R. 12. It would seem that the arbitrators' authority terminates as soon as they have notified the parties that they cannot agree, and they cannot afterwards, without consent of the parties, assume to act under the original authority: 3 Cyc. 630. Where two arbitrators fail to

agree, and under the submission an umpire is called upon, with whom the arbitrators have no power to concur, the arbitrators' authority is gone: Westminster v. Clayton, 13 W. R. 134.

In the present case the arbitrators' authority was, in my opinion, completely gone as soon as the time fixed for making their award had expired, and they would have no authority to go and act without a renewal of authority. Mr. Riley was no longer the city's arbitrator. It makes no difference that the by-law originally appointing him had not been repealed. His authority to act under it was gone. The parties were relegated back to the position they were in at the beginning, and, if the matters in difference were to be again referred to arbitration, proceedings would have to be taken de novo.

The notice served on behalf of Bennetto calling upon the city to appoint an arbitrator was regular, and the mayor not having appointed an arbitrator within 7 days thereafter, the city corporation were in default under sec. 805. It follows that the County Court Judge has jurisdiction to nominate an arbitrator on behalf of the city.

The application for prohibition must be dismissed with costs.

MANITOBA.

FEBRUARY 21ST, 1908.

COURT OF APPEAL.

DUNN v. SEDZIAK.

Builders and Workmen's Act—Lien of "Workmen" for Wages—Employment "by the Day," under sec. 3—Attachment of Debts—Judgment Creditor—Claimants — Priorities.

Appeal by claimants in a garnishment from an order of CAMERON, J., barring their claims.

The plaintiff brought this action and recovered judgment against the defendant, and issued a garnishing order against the Canadian Pacific Railway Company. On the return of

the summons to pay over, certain claimants appeared claiming as workmen under the Builders and Workmen's Act, R. S. M. 1902 ch. 14, the garnished moneys being the contract price for a building erected by the defendant for the garnishees, and these workmen claiming the property for wages earned by them in the erection of that building.

There was no dispute as to the facts. It was admitted that the claimants were entitled to priority over the garnishing order if they were "workmen" within the meaning of the Act. It was admitted that they were employed at the rate of so much per hour. Nothing further appears to have been agreed upon as to the terms or duration of their employment.

CAMERON, J., held that they were not employed "by the day" within the meaning of sec. 3 of the Act, and he made an order barring them.

The claimants appealed.

F. Heap, for the claimants.

J. R. Higgins, for the plaintiff.

THE COURT (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), dismissed the appeal without costs, holding that the men hired in the above manner were not workmen "by the day" within the meaning of sec. 3 of the Builders and Workmen's Act.

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

REX v. GAGE.

Criminal Law—Conspiracy—Trade Combination—Criminal Code, sec. 498 — Construction — "Undue" Restraint — Conditions Governing Grain Trade of the West—Grain Dealers' Associations—By-laws, Regulations, and Agreements—Restraint of Trade—Regulation of Prices—Pooling Receipts—Commission Rule—Evidence—Crown Case Reserved.

The defendants were indicted at the spring assizes of 1907 for (among other offences) that they did conspire, combine,

agree, and arrange with each other to restrain trade or commerce in relation to an article which might be the subject of trade or commerce, to wit, grain; and also that they did conspire, combine, agree, or arrange with each other to injure trade or commerce in relation to an article or commodity which might be the subject of trade or commerce, to wit, grain.

The trial Judge, PHIPPEN, J,A., found that the agreements (one of which was to charge one cent commission on grain dealt with) were honestly made to promote the business interests of the defendants, and were not intended to and did not unduly limit, prevent, or lessen, or unnecessarily enhance the price of grain: 6 W. L. R. 19.

On these findings of fact the Crown were dissatisfied with the decision arrived at by the Judge, and requested him to state a case for the opinion of the Court of Appeal. The Judge accordingly stated a case, asking the Court of Appeal if he was correct, on his findings of fact, in holding the defendants not guilty on the above charges.

At the trial the Crown tendered in evidence books of certain elevator companies which were not connected with the accused. PHIPPEN, J.A., rejected this evidence, and the Court of Appeal were asked to say whether he was correct in doing so.

The case was heard by HOWELL, C.J.A., RICHARDS, J.A., PERDUE, J.A.

R. A. Bonnar, J. E. O'Connor, and H. P. Blackwood, for the Crown.

J. A. M. Aikins, K.C., and T. Robinson, for the defendants.

HOWELL, C.J.A.:—This case requires the consideration of secs. 496 and 498 of the Criminal Code. Section 496, read in connection with sub-sec. (b) of sec. 498, continues the old law of conspiracy in restraint of trade, but the last mentioned section, with its sub-secs. (a), (c), and (d), creates a new statutory crime. In this view of the law I am supported by the judgments of Meredith, J., and the Ontario Court of Appeal in Rex v. Elliott, 9 O. L. R. 648, 5 O. W. R. 163.

In considering an offence under this statute, but little assistance can be had from the old cases so numerously cited and relied upon in the argument.

The section with sub-sec. (d) declares that "every one is guilty of indictable offence . . . who conspires, combines, agrees, or arranges with any other person . . . to unduly prevent or lessen competition in the . . . purchase or sale . . . of any such article or commodity."

The statutory crime is complete if the combination unduly prevents competition, and the old question as to unlawfulness or unlawful means does not arise.

The provisions of the Manitoba Grain Act were not discussed on the argument, although, to my mind, they are important elements in the case.

The purchase of wheat,the chief business of this country, is, in the nature of things, a partial monopoly. Wheat worth on an average only about one cent per pound must be hauled by waggons or sleighs often long distances, and because of its cheapness and bulk it must be handled by machinery and gravity and in a sense treated as a liquid.

To handle it, there must be huge elevators adjoining the railway tracks at sidings and necessarily limited in number, and these are usually erected on the lands of the railway company.

Unlike other commodities, the railway companies do not supply warehouse facilities for grain, and practically only those having elevators can buy, because they only can handle the grain.

For the purpose of giving relief to grain growers, the Parliament of Canada passed the statute known as the "Manitoba Grain Act," and provided, amongst other things, that the railway companies should supply loading platforms and cars so that farmers could themselves load grain directly into cars, and thus to some extent be independent of the elevators.

The Act also provides that no person can (1) operate an elevator, (2) buy grain on commission, (3) purchase carloads of grain loaded as above set out, or (4) operate a terminal elevator, without taking out a license and entering into bonds.

Thus the number of those who can compete in the purchase of wheat, the great industry of this country, is greatly limited.

It appears that these licensed traders, by by-laws of the Grain Exchange, of which they are members, amongst others things, provide, as found by the learned trial Judge in his judgment made a part of the case, that licensed track

buyers, that is, buyers of car load lots, should be restricted in their purchases to the closing prices in the Grain Exchange fixed at about one o'clock each day, which price, no matter what changes in the world's prices took place, must not be exceeded for 24 hours.

The result was that this class of licensees (themselves in a way monopolists) handed over their business of fixing prices and of competing amongst themselves, to the whole of the licensees who were members of the Grain Exchange, many of whom must be persons to whom the track buyers would look as purchasers. However, from the view I take of the case submitted, this matter and others argued at the hearing need not be further considered.

If from these facts I should draw the irresistible conclusion, really a conclusion of law, that the restraint in competition is undue, I think clearly it is not open to me, and so the subject need not further be considered.

I think the subject is not open for decision on the following grounds:—

The only portion of the case referring to this subject is paragraph 1, which is as follows:

"(1) The defendants in conducting their business as grain merchants became parties to certain agreements which were intended as, and, in my opinion, were, reasonable, business regulations only, but which, to a limited extent, restricted trade in an article which was the subject of trade and commerce, namely, grain. The agreements were honestly made to promote the business interests of the accused, and were not intended to, and did not, unduly limit, prevent, or lessen, or unnecessarily enhance, any of the matters or things referred to in sub-secs. (a), (c), or (d) of sec. 498 of the Criminal Code. On these facts and on further stated reasons set out in my judgment, a copy of which is marked 'B' hereto, I found the accused 'not guilty.'

"The first question for the opinion of the Court of Appeal is, should I, on this finding of fact, have held the accused guilty under either or both of the first or second counts of the indictment?"

The first and second counts of the indictment each charge an ordinary trade conspiracy under the old law, and clearly the facts and findings set out in the case do not justify a conviction under that law. The case being framed so as to exclude the statutory crime from consideration, the first question must be answered in the negative.

The second and third questions are merely as to the reception of evidence. The answer to each should be that the learned Judge did not commit error in rejecting the evidence.

RICHARDS, J.A.:—A true bill was found at the spring assizes, 1907, against the defendants. The first two counts, which are the only ones in question now, are as follows:—

1. J. C. Gage, J. G. McHugh, and John Love, and other persons, to the jurors unknown, at the city of Winnipeg, in the province of Manitoba, on or about 1st September, 1906, did conspire, combine, agree, and arrange with each other to restrain trade or commerce in relation to an article which may be a subject of trade or commerce, to wit, grain.

2. And the jurors aforesaid do further present that the said J. C. Gage, J. G. McHugh, John Love, and other persons, to the jurors unknown, at the city of Winnipeg, in the province of Manitoba, on or about 1st September, 1906, did conspire, combine, agree, or arrange with each other to injure trade or commerce in relation to an article or commodity which may be a subject of trade or commerce, to wit, grain.

The charges intended to be indicated by those counts come under the provisions of sec. 498, sub-sec. (b), of the Criminal Code.

The accused exercised their right, under sec. 581 of the Code, to be tried by a Judge without a jury. They were so tried by Mr. Justice Phippen and acquitted. At the request of the Crown, Mr. Justice Phippen reserved a case for the opinion of the Court of Appeal, under the provisions of sec. 1014 of the Code, which provides that the Court before which any accused person is tried may reserve any question of law arising either on the trial or on any of the proceedings, preliminary, subsequent, or incidental thereto, for the opinion of the Court of Appeal.

I draw attention to the fact that the statute only allows the Judge to reserve questions of law, and gives him no power to reserve questions of fact. This construction of the statute has been repeatedly upheld in this and other Courts.

It is necessary to state this clearly, because, otherwise, owing to this Court being referred to in the Code as a Court of Appeal, it might be supposed to have the powers to review findings of fact that it has in civil suits.

By a special provision of the Code, sec. 1012, there is a provision that, in case of the conviction of a person charged with a conspiracy under sec. 498, where he has been tried by a Judge without a jury, there shall be an appeal to the Court of Appeal upon all issues of law and fact. But that provision, as will be seen, is explicitly limited to a case where the accused has been convicted. It could not apply to this case, where the accused have been acquitted.

All other appeals in criminal matters come under the provisions of sec. 1014, and are limited to questions of law only.

The learned trial Judge reserved three questions, the second of which was abandoned by counsel for the Crown on the argument. The first question is stated as follows (using the language of the stated case) :—

"1. The prisoners, in conducting their business as grain merchants, became parties to certain agreements which were intended as, and, in my opinion, were, reasonable business regulations only, but which, to a limited extent, restricted trade in an article which was the subject of trade and commerce, namely, grain. The agreements were honestly made to promote the business interests of the accused, and were not intended to, and did not, unduly limit, prevent, or lessen, or unnecessarily enhance, any of the matters or things referred to in sub-secs. (a), (c), or (d) of sec. 498 of the Criminal Code. On these facts and on further stated reasons set out in my judgment, a copy of which is marked 'B' hereto, I found the accused 'not guilty.'

"The first question for the opinion of the Court of Appeal is, should I, on this finding of fact, have held the accused guilty under either or both of the first and second counts of the indictment?"

The learned trial Judge, influenced, no doubt, by a desire to allow the fullest possible discussion of the case before this Court, purported to make his judgment, which was given in writing, a part of the stated case. He also annexed to the case a copy of the evidence taken at the trial.

It has been held by the Courts in this province and in Ontario that, in a case of this kind, where questions of fact cannot be reconsidered, or reviewed, the evidence should not be annexed as part of the reserved case. The rule is that it is a matter of law whether there is any evidence to support findings of fact, but that so long as there is any such evidence (and it is not denied in this case that there

was evidence in support of every finding of fact which the learned trial Judge made), the sufficiency of that evidence is a matter of fact, which cannot be inquired into on a reserved case.

The learned Judge has, in the stated case, and in his judgment annexed to it, stated his findings of fact. I have, for the reasons above mentioned, no power whatever, as the law stands, to review those findings, but am bound, for the purposes of deciding the points of law involved, to accept those findings as final.

The charges made against the defendants, under the first two counts of the indictment, were that, being members of the Winnipeg Grain Exchange, they, and the other members, were guilty of offences under sec. 498 of the Criminal Code, sub-sec. (b). They were also charged under other subsections of sec. 498; but, as the first question in the reserved case only touches matters purporting to be under sub-sec. (b), that is all that we have power to consider. The acts which the defendants, as members of the Grain Exchange, are charged with having conspired with their fellow members to do, and which are alleged to be offences under subsec. (b), are as follows:—

1. Prohibiting members by rule of the association from charging, on the purchase or selling of grain, less than one cent per bushel as a commission.

2. Prohibiting members from employing agents to buy grain at points where the volume of business is not sufficient to enable them to pay an agent a salary of $50 per month.

3. Forbidding members from buying track wheat outside of Winnipeg between the hours of 9.30 a.m. and 1.15 p.m., these being the hours during which trading is done on the floor of the exchange.

4. Forbidding elevators from having more than 5,000 bushels in store at any one time, during the season of the year when it is uncertain whether wheat, when bought, can be exported by rail and lake route, or will have to be exported by all rail route, or stored till the opening of navigation in the following year.

5. Pooling receipts at points where, owing to construction of new railway lines, producers of wheat, who formerly hauled their grain to these points have been led to haul to other points on such new lines to such an extent as to leave the previous elevator capacity, at these original points,

greater than the balance of traffic still remaining there calls for.

As to the commission of one cent per bushel, the trial Judge finds, as a fact, that this is the lowest price at which the business can properly be done, with a reasonable profit to those engaged in it, and that the allowing a reduction below that reasonable rate, would result in an unstable market.

As to the second point, the learned Judge finds as a fact that this rule was necessary owing to it being found that, where the amount of wheat offered for sale was very small, too great commission had to be paid to local buyers, at those points, to leave a fair profit to the members of the exchange employing such buyers. He further finds that this rule did not materially lessen the convenience of the local market to the producers.

He finds that the third regulation, the forbidding buying track wheat outside of Winnipeg between 9.30 a.m. and 1.15 p.m., is a necessary and reasonable protection to the members of the exchange themselves, owing to the fact that during those hours prices of wheat often fluctuate very rapidly because of changes in the world's grain markets, and that, as a result of the delays in telegraphing to, and getting replies from, owners of country track wheat, during the hours that the exchange is open (9.30 to 1.15), members of the exchange were, prior to the enactment of the prohibiting rule, found to be at a great disadvantage in this, that, owing to rapid rises and falls in the foreign market during those hours, a buyer who wired an offer to the holder of country track wheat, put it in the power of the person to whom the offer was so wired to accept it later on if the price of wheat should fall during the above hours, and refuse it if the price should rise. The learned Judge finds, as I understand it, that this was a disadvantage to the members, and one for which the prohibition in question was a reasonable remedy.

He also holds, in effect, that after the closing of the trading hours in Winnipeg, except for some unexpected and unusual occurrence suddenly affecting the market, the price would remain practically as it was at the closing hour, until the opening of the trading hours in the exchange on the following day; and that buying after 1.15 p.m., if conducted fairly according to the closing prices at that hour, is reasonably fair to both parties, and does not leave either party at the mercy of the other, as might be the result if

outside track buying were allowed during the open hours of the exchange's trading.

The trial Judge further finds, as a fact, that the closing price was wired out immediately after 1.15 p.m., and was. less the 1 cent charged as commission, used as a buying price for track wheat until 9.30 next morning, and that the closing price was fairly stated in so wiring—the wiring being done by one official, within whose duties it came.

The prohibition fourthly above named arises, as found by the learned Judge, from the difference between cost of getting grain to foreign markets, if shipped through by rail beyond Fort William—the former cost being considerably less than the latter. He finds that the regulation was simply intended to protect members, during the short period in which there was a doubt as to how wheat, then bought, could be got out, from the risk of too great loss in case of buying on lake and rail basis and being driven to export by all-rail. He finds, further, that this restriction was always removed as soon as the subsequent wheat carrying was sure to be on the all-rail basis.

As to the fifth point, the pooling, the learned Judge finds that, where enough elevators have been erected at points to handle the traffic, and thereafter, owing to the cutting off of territory by new lines of railway, traffic is in part diverted from those points (so that the remaining traffic is less than all the elevators can handle at a profit), those members of the exchange who are elevator owners at such points would have been driven to either have one buyer for all, and cut down elevator expenses in proportion (which is accomplished by the pooling), or, if each elevator competed, then to increase elevator charges or do business at a loss. He finds that this pooling has not lessened the prices paid or increased the cost in any way to the producers, but has prevented the increase in elevator charges that would, otherwise, in case of competition continuing, be necessary to prevent loss.

He finds that the different acts complained of, taken in connection with their surroundings, made for a more stable market, and that their effect has been for the public good.

A conspiracy, at common law, is an agreement of two or more parties to do an unlawful act, or to do a lawful act by unlawful means. See per Tindal, C.J., in O'Connell v. The Queen, 11 Cl. & F. 213. It is more fully defined, I think, by Mr. Justice Fitzgerald in his charge to the jury

in the case of The Queen v. Parnell, 14 Cox C. C., where he says, at p. 513: "Conspiracy has been aptly defined as divisible under three heads—where the end to be attained is in itself a crime; where the object is lawful but the means to be resorted to are unlawful; and where the object is to do an injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime."

The last head of the definition is well illustrated by a quotation from the part of the same charge which immediately precedes the above quoted definition: "If, for instance, a tenant withholds his rent, that is a violation of the right of his landlord to receive it, but it would not be a criminal act in the tenant, though it would be the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is by the law of the land an offence."

Another illustration is given by Quinn v. Leathem, [1901] A. C. 495, where the defendants were held liable in damages for conspiring to violate a legal right by interfering with contractual relations between the plaintiff and his employes, for the direct purpose of doing the plaintiff an injury in his business.

None of the acts in the present case, as found by the trial Judge, are crimes in themselves. There is no suggestion of a conspiracy to use unlawful means to accomplish any acts, and none of these acts, if done by an individual, would in themselves be civil wrongs or violations of private rights.

It has been held, in the highest Courts of England and the United States, that regulations intended, and primarily operating for, the proper carrying on of a trade, and for the reasonable benefit of the members of the association making the regulations, are not a crime or an illegal conspiracy, even though indirectly, to some extent, they do restrain trade.

It has been argued that, as Parliament has enacted legislation on the point, we must take sec. 498, sub-sec. (b), of the Code as we find it, and that, when it says every one is guilty who conspires, combines, agrees, or arranges with any other person to restrain or injure trade or commerce, we must read it literally as it is worded, and without qualification of any kind. If that is the way to construe it, then

any act whatever which, however indirectly or lightly, operates in restraint of trade, is a crime under this section.

In Swaine v. Wilson, 24 Q. B. D., the plaintiff sued the defendants, as officials of a society of which the plaintiff was a member, to recover a sum that he claimed to be entitled to be paid under the society's rules. The defendant set up that the objects of the society, as set forth in its rules, were in restraint of trade, and that, therefore, the society was illegal, and the plaintiff could not recover. In delivering judgment Lord Esher says, at p. 257, referring to the society's rules: "I do not think the rules challenged are vicious as being in restraint of trade. I do not think they were intended for that purpose. They were, as it seems to me, intended to be for the purpose of preventing extravagant outlay by the society, and of economizing that which the society might have to do for its members; and, in my opinion, their provisions do not exceed what is reasonable and necessary for that object. Although, if carried into effect, they may to some extent be in restraint of trade, yet that not being their object, and their provisions being only sufficient for a legal object, I do not think that we ought to extend the doctrine with regard to restraint of trade so far as to hold them illegal as being in restraint of trade." In the same case Lindley, L.J., says at p. 261: "The test of validity in a case like this is reasonableness with reference to the real and legitimate objects of the society. . . . Rules made for the bona fide purpose of protecting the funds of the society from claims which can be avoided by reasonable care and management, will not be invalid on the ground that they are in restraint of trade, provided the rules are not unduly oppressive or obviously detrimental to the public. To render rules for the above purposes invalid, it must be clearly shewn that they go beyond what is necessary for those purposes."

The United States Interstate Commerce Act says: "Every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal."

It will be seen that the wording of the Act is entirely unqualified, and is as comprehensive as general language can well be made.

In Hopkins v. United States, 171 U. S. R., Peckham, J., delivering the opinion of the Supreme Court of the Uni-

ted States, at p. 594, says: "An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct. Reasonable charges for the use of a facility for the transportation of interstate commerce have hitherto been regarded as valid in this Court, even though such charges might necessarily enhance the cost of doing the business. An agreement among the owners of such facilities to charge not less than a minimum rate for their use can not be condemned as illegal under the Act of Congress."

In United States v. Joint Traffic Association, 171 U. S. R., the same learned Judge says, at p. 568: "In Hopkins v. United States, decided this term, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the Act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the Act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, we think, covered by the Act, although the agreement may indirectly and remotely affect the commerce."

For the Crown reliance, as to the interpretation of the Interstate Commerce Act by the United States Supreme Court, was placed on the case of United States v. Trans-Missouri Freight Association, 166 U. S. R., to shew that that Act was construed as the Crown counsel asks this Court to interpret sec. 498, sub-sec. (b), of our Code.

In dealing with that contention it is only necessary to quote from the opinion of the same Court in the above case of United States v. Joint Traffic Association, at p. 568, where it says: "To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one

not called for or justified by the decision mentioned, or by any other decision of this Court."

As mentioned by the trial Judge in his judgment, Chief Justice Killam, in Gibbins v. Metcalfe, 15 Man. L. R. 560, considered very carefully the effect of sec. 498, which was sec. 520 as the Code then stood. After pointing out that it is apparent that sub-sec. (b) could not be intended to embrace every combination which would prevent or restrain trade, the learned Chief Justice said, at p. 583: "At most I can take it to include only combinations for the direct purpose of preventing or materially reducing trade or commerce in a general sense with reference to a commodity or certain commodities." He did not discuss the effect of reading sec. 496 (then sec. 516) with the section he had under discussion; but, if his opinion, which is necessarily entitled to great weight, is to be taken as correct, then even if sec. 496 did not exist, sec. 498 would not, on the trial Judge's findings of fact, apply to the acts proved against the defendants in this case.

It would, in any event, be impossible to accept as correct the interpretation of sub-sec. (b), contended for by the counsel for the Crown. Almost any dealing in any way with trade may restrain or injure it to some extent. If a village has two shopkeepers and they go into partnership, it is a restraint of competition, and therefore a restraint of trade. Many other instances might be cited to shew the unreasonableness of the argument that every combination which indirectly affects a restraint of trade, however slight, is punishable.

But it seems to me that sec. 496 disposes of the Crown's contention. That section says: "A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade."

It must, I think, be read with sec. 498, sub-sec. (b). Reading them together, a conspiracy to do acts in restraint of trade cannot be an offence within the statute, unless those acts are, in themselves, such as, if done by individuals without any conspiracy to do them, would be unlawful acts.

Taking the trial Judge's findings of fact as to the acts in question, I am unable to see that any one of them, if done by an individual in his own business, would be unlawful: and that, I think, is the test in construing sec. 496.

I would, therefore, answer the first question in the negative, as I do not see how, having found the facts as he has, the trial Judge could, on such findings of fact, have held, as a matter of law, that a crime had been committed.

The contention was raised that the above quoted first and second counts in the indictments are so worded as to be bad in law, and should have been quashed by the trial Judge, to whom, apparently, application was made for that purpose at the trial. As he has acquitted the defendants, that question is now immaterial, and, as he has not reserved it in the stated case, it cannot now be dealt with, as this Court is limited to the questions raised by the stated case. But, merely that I may not appear to be assenting to the form of those first two counts as precedents for indictments, I say that I am not satisfied as to the sufficiency.

As pointed out above, the second question reserved was abandoned by the Crown on the hearing of the reserved case.

The third question reserved is as follows: "Counsel for the Crown tendered the books of certain elevator companies, with which these defendants did not appear to be connected, as evidence to shew from the entries therein that these companies had made more than one cent a bushel profit on wheat handled. Such testimony, to apply to the issue, would have imposed on me the necessity of practically auditing the books for the purpose of excluding speculative profits. In view of the fact that the Crown's witnesses who testified had all stated that the profit (excluding speculative changes in value) did not exceed one cent a bushel, and without considering whether entries in books between which and the defendants, or any of them, no connection had been established, would be evidence against them on a criminal prosecution, I rejected this evidence. My ruling did not apply to the books of companies with which these defendants or any of them were connected. The evidence tendered and my ruling appear on pp. 449, 450, 451, of the evidence.

"The third question for the Court is, was this evidence properly rejected, and if not, has there been a mistrial in consequence?"

The argument of the Crown, on this point, is that the acts of one conspirator may be given in evidence against a co-conspirator. It is laid down in Archbold's Criminal Pleading and Evidence, 23rd ed., at p. 1288, that the acts

and declarations of any of the conspirators, in furtherance of the common design, may be given in evidence against all. But it is further laid down that, before the acts of one conspirator may be given in evidence against another, there must be shewn the existence of the conspiracy; that the parties were members of the same conspiracy; and that the acts in question were done in furtherance of the common design.

If there had been any evidence given of conspiracy, or common design, to charge a greater commission, or profit, on grain than one cent per bushel, the evidence referred to in this third question might have been receivable to aggravate the alleged crime by shewing that the conspiracy so formed had been carried into effect.

Or, if conspiracy were shewn, but the common design were doubtful, acts of other members of the conspiracy might be proved to shew what the common design consisted in.

But, when the common design is shewn, as it is here, to be contained in printed rules, and to be one to not charge less than one cent, the charging by other members of more than one cent would not, if proved, be evidence against defendants.

If the evidence was tendered to shew that the proved common design to charge not less than one cent, was acted upon, it was unnecessary, as that fact was admitted.

I am of opinion, therefore, that the trial Judge properly refused the evidence, and would so answer his third question.

PERDUE, J.A.:—This is a case reserved by the trial Judge under sec. 1014 of the Criminal Code. The accused Gage, McHugh, and Love, were tried before Mr. Justice Phippen, without a jury. A verdict of "not guilty" was entered, and at the request of the Crown several questions of law were reserved for the opinion of the Court of Appeal.

The accused were indicted for conspiracy under sec. 498 of the Criminal Code.

Only the first and third questions were argued by the Crown, the second being abandoned.

The defendants are grain dealers, and are, or were, connected with the Winnipeg Grain and Produce Exchange, the Grain Dealers' Association, and the Elevators' Association. It was contended on behalf of the Crown that certain

by-laws and resolutions passed by one or other of these associations, and certain agreements entered into between the members, to which agreements the accused were parties, constituted a conspiracy in restraint of trade, within the meaning of sec. 498 of the Code.

In the questions stated by the trial Judge for the opinion of this Court, he has set out certain findings of fact which are not open to review, and which must be accepted by the Court as conclusive so far as the facts are concerned. The accused having been acquitted, and the questions now under consideration having been stated at the request of the Crown under sec. 1014 of the Criminal Code, there is no appeal upon the facts, as there would have been under sec. 1012, if there had been a conviction. It is true that the trial Judge appended to the reserved case a copy of the evidence, but that was only for the purpose of explaining and elucidating the questions asked, so that the Court sitting in appeal could fully understand the drift and bearing of the questions.

He also made his written judgment a part of the case in order to inform the Court of his reason for arriving at the several conclusions referred to in the reserved case.

The principal ground relied upon by the Crown was that there was an agreement between the members of the Grain Exchange, to which the accused were parties, that no prices would be quoted for track wheat, that is, wheat in cars, at country points during the hours from 9.30 a.m to 1.15 p.m. These were the open hours of the Exchange. Prior to this agreement a person at a country point could obtain a quotation for wheat from a member of the Exchange, and a further and later quotation from another. Such person could then accept whichever one was highest. This, as the trial Judge finds, had the effect of giving a temporary option during the active hours of the market, to the detriment of the members. At the close of each day's market the secretary of the Grain Dealers' Association wired the closing quotation to buyers at country points. This agreement did not apply to street wheat, that is, wheat delivered from farmers' waggons.

A person having a car-load of wheat on the track could not, by reason of the above agreement, sell this wheat at a country point until after 1.15 p.m., although he could send his car forward on the way to Fort William, send the bill of lading to a bank in Winnipeg, and there sell through

a commission dealer or directly to a grain merchant at any hour of the day.

Another ground relied upon by the prosecution was that a by-law had been passed by the Exchange preventing members from employing a purchasing agent at points which did not justify payment of a salary of $50 a month.

The trial Judge dealt with these and other questions raised, and found that the agreements to which the accused were parties, were reasonable business regulations only, but that they did to a limited extent restrict trade in an article which was the subject of trade and commerce, namely, grain. The first question of law, therefore, for this Court to decide is, whether upon this finding the accused should have been found guilty under sub-sec. (b) of sec. 498 of the Criminal Code. The further finding of the trial Judge that the agreements were honestly made to promote the business interests of the accused, and were not intended to and did not unduly limit, prevent, or lessen, or unnecessarily enhance, any of the matters and things referred to in sub-secs. (a), (c), or (d) of the above section, disposes of all the counts in the indictment except the first and second.

By sec. 498 of the Code every one is guilty of an indictable offence and liable to a penalty . . . who conspires, combines, agrees, or arranges with any other person or with any railway, steamship, steamboat, or transportation company, (b) to restrain or injure trade or commerce in relation to any article or commodity which may be a subject of trade or commerce.

It was contended by counsel for the Crown that the scope of this provision was not in any way qualified or limited, and that every combination or agreement which had the effect of restraining trade in respect of an article of trade became an indictable offence under this section.

In that view many partnership agreements and numerous honest and legitimate arrangements such as are of every day occurrence, would be made offences under the section. The trial Judge followed the opinion expressed by Killam, C.J., in Gibbins v. Metcalfe, 15 Man. L. R. 583; and inclined to the view that this sub-section relates to those restraints which are not justified by any personal interests of the contracting parties, but which are mere malicious restraints unconnected with any business relations of the accused.

In arriving at the construction to be placed upon the section in question, we must turn to the preceding section, 496. This latter section must be read in connection with sec. 498. Section 496 is in the following words: "A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade." This is a definition in general terms of what constitutes the offence. Section 498, reading the main portion of the section in connection with paragraph (b), provides the penalty for that offence. I take it, therefore, that to constitute an offence under paragraph (b), there must be a conspiracy to do or procure to be done some unlawful act in restraint of trade. Anything that operates to restrain trade must also injure trade by taking away from the freedom of exchange.

Whatever distinction may be drawn between the words "restrain" and "injure" in this section, the restraint or injury complained of must, in order to constitute the offence, be founded upon some unlawful act.

The two sections, 496 and 498, are not happily framed, although the latter has been amended and re-amended. I am, however. convinced that the plain intention was, under sub-sec. (b), to make it an offence to conspire to restrain or injure trade by doing an unlawful act in restraint of trade. The word "unlawful" should be taken in a wide sense so as to include not only what is contrary to law, but also the violation of some legal right or the doing of something illegal, such as making a contract expressly aimed at restraint of trade. A conspiracy or combination to induce workmen to break their contracts and desert their employment would be a violation of the legal rights of the employers: Quinn v. Leathem, [1901] A. C. 495; and if extensive in its results would be in restraint of trade. In order to maintain a civil action for damages resulting from a conspiracy aimed at the person complaining, it is necessary to shew that an injury has been done or a legal right interfered with. But, even if there is a conspiracy to injure a man, and injury is inflicted upon him, no action will lie against the persons who so conspire if they merely exercise their own rights and do not infringe the rights of other people. The acts of such persons may be legitimately done to secure or advance their own interests, although causing damage to other persons; Mogul S.S. Co. v. Mc-

Gregor, [1891] A. C. 25; Quinn v. Leathem, [1901] A. C. 539; Allen v. Flood, [1898] A. C. 1.

In the present case the trial Judge has found that the agreements complained of were intended as, and, in his opinion, were, reasonable business regulations only, and were honestly made to promote the business interests of the accused. There is nothing in the reserved case or in the Judge's findings to shew that any injury has been done to any person or persons or that any legal right has been interfered with.

A trader may in all matters not contrary to law regulate his own mode of carrying on his trade according to his own discretion and choice: Hilton v. Eckersley, 6 E. & B. 74; Mogul S.S. Co. v. McGregor, pp. 36-39. A single trader might refuse to buy grain during certain hours of the day, believing it to be to his interest to refrain from so doing. Aside from the statute, would such an act be unlawful if done in combination with others? I think the judgment of Lord Halsbury in the Mogul case, at p. 38, supplies an answer to that question: "If no legal right has been interfered with and no legal injury inflicted, it is vain to say the thing might have been done by an individual, but cannot be done by a combination of persons." This language was used in giving judgment in a civil action for damages sustained under an alleged conspiracy which operated to the detriment of the plaintiffs.

Applying the provisions of the statute to a combination by certain persons who unite with the object of refusing to buy grain during certain hours, it must be shewn in order to constitute the offence under paragraph (b), that their purpose was to do something unlawful, something illegal or injurious. Their action must cease to be a legal and honest combination to protect or further their business interests, and must, in addition, operate as an actual restraint or injury to trade.

The trial Judge found not only that the agreements in question were reasonable business regulations, honestly made to promote the business interests of the accused, but also that they were not intended to and did not limit the facilities for transporting, storing, or dealing in grain, or unduly prevent or lessen competition in the purchase, barter, sale, transportation, or supply of that commodity. Taking his finding to be conclusive on these points, as we must, I cannot see how the accused can be found guilty of having done

or procured to be done an unlawful act in restraint of trade.

Counsel for the Crown contended that sec. 496 only refers to the word "conspires" in sec. 498, and that it did not qualify or affect the other words "combines, agrees, or arranges" found in that section. This contention is, I think, manifestly untenable. It is unlikely that Parliament would impose a limitation upon the meaning of "conspiracy in restraint of trade," and at the same time declare that every agreement or arrangement which operates in restraint of trade should, without limitation or qualification, be a criminal offence. The words "conspires, combines, agrees, or arranges" are used synonymously in the first part of sec. 498. No doubt, the framer of these sections had in his mind the words commonly used in an indictment charging conspiracy, that the accused "unlawfully did amongst themselves conspire, combine, confederate, and agree," etc. See Regina v. Rowlands, 2 Den. C. C. 364; O'Connell v. The Queen, 11 Cl. & F. 155; Arch. Crim. Plg., 23 ed., p. 1286.

In the statute the word "arrange" is used in the place of "confederate," but this does not affect the point. These 4 words, when found in an indictment, are used collectively or cumulatively to denote the single idea of a conspiracy. The words "comprises, combines, or arranges," used in sec. 498, when taken either single or collectively with paragraph (b), refer to the one offence of conspiracy in restraint of trade defined in sec. 496. These words, taken either collectively or individually, or any one of them, express the act of agreeing to do the unlawful thing, the doing of which constitutes the conspiracy.

In regard to the by-law of the Grain Exchange preventing members from paying purchasing agents less than $50 a month, the trial Judge found that this did not affect the price paid to the farmer, and did not increase the profits of the dealer or materially lessen the convenience of the local market to the purchaser. He also found that the by-law was passed for the supposed furtherance of the business of the Exchange. For the reasons already given, the passing of the by-law or the conducting of business by the members in accordance with it, cannot, in view of these findings, be held to be a conspiracy in restraint of trade.

I would answer "No" to the first question asked in the reserved case.

So far as the third question is concerned, I think the trial Judge properly rejected as evidence the books of elevator companies with which the accused did not appear to be connected. I would, therefore, answer this question with the words, "The evidence was properly rejected."

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

DOUGLAS v. FRASER.

Husband and Wife — Business Carried on by Husband in Name of Wife—Stock in Trade Seized by Execution Creditors of Husband—Married Women's Property Act—Construction—Earnings of Married Woman—Investment in Land—"Property"—Corpus—Profits of Business — Burden of Proof—Evidence—Stock Paid for Largely by Husband's Money—Interpleader Issue.

Appeal by plaintiff from judgment of MATHERS, J., 6 W. L. R. 244, in favour of defendants upon an interpleader issue.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

I. Pitblado and D. W. McKerchar, for plaintiff.

T. M. Daly, K.C., and W. M. Crichton, for defendants.

RICHARDS, J.A.:—The claimant's husband bought a property in Jarvis street, in Winnipeg, with his own money. In February, 1893, he conveyed it to the claimant as a gift. He was not then in any financial difficulties, and did not then owe the debt upon which the present defendant subsequently recovered the judgment hereinafter mentioned. Later on, but several days before the coming into force of the Married Women's Property Act of 1900, he, acting under a power of attorney from the claimant, sold this property and conveyed it. He received for it $1,300, which he handed over to a

friend named Dixon, who had been acting as a trustee in holding moneys for the claimant.

About 7 months before the coming into force of the Act of 1900, a business had been started by the claimant as a maker up of and dealer in furs. It started in a very small way, and such moneys as she received, over and above living expenses, she apparently put in Mr. Dixon's hands; while he, when she needed money, paid it out for her. There is no evidence of anything more than living expenses being made out of the business prior to the sale of the Jarvis street property. The proceeds of this sale were put into the business, which thereafter increased till there came a time when the stock in trade was a considerable one.

From the beginning the business had been carried on in the name of Douglas & Company, and a certificate had been registered shewing the claimant to be the sole owner of the business.

Apparently the business made profits; but it is not shewn what these profits were, though doubtless some, at least, of the profits went into the business.

The claimant's husband leased for her the premises in which the business was carried on, and attended to the buying and selling, banking, and other matters. She only took charge of the workroom in which the furs were cut and sewed and prepared for sale.

The claimant's husband had become insolvent prior to the commencement of the business. In the latter part of 1906 Donald Fraser, the defendant in the present action, recovered a judgment against the claimant's husband in respect of an old liability. Execution was issued on that judgment, and the stock in trade of Douglas & Company was seized under it by the sheriff. An order was made for the trial of an issue, in which the claimant was made plaintiff, and Donald Fraser defendant, the question to be whether, at the time of the seizure by the sheriff, the goods were the property of the claimant as against the execution creditor.

The issue was tried before Mathers, J., who gave judgment in favour of the execution creditor, the defendant in the interpleader action. The claimant has appealed to this Court.

When the Jarvis street property was conveyed to the claimant, and until a few days after it was sold in 1900, the statutory rights of a married woman to hold, free from the debts, obligations, control, or disposition of her husband, pro-

perty acquired by her during coverture, were contained in sec. 2, ch. 95, R. S. M. 1892, the last clause of which says: "But this section shall not extend to any property received by a married woman from her husband during coverture."

The trial Judge holds that the above restriction prevents the claimant from now setting up that the land, or its proceeds, ever became her separate property. He finds that the land was, during the claimant's ownership, subject to the husband's common law rights, and that, when it was sold, the proceeds belonged to the husband, and that, when he handed these proceeds over in trust to Dixon, they remained his property, and that, therefore, the business was practically established with the husband's moneys.

He further holds that, as the husband managed the business, the profits, if any, became the husband's; so that, as the stock in trade must have been purchased either with the original capital or the profits of both, it was, in any case, purchased with the husband's moneys, and was his business.

He finds that the creditors who sold to the claimant the goods in question, sold them to her upon her personal credit, and would not have sold them to the husband, because of the liabilities hanging over him.

He holds that, as the specific words "earnings, money, and property" used in sec. 2 (b) of the Act of 1902, are followed by restrictive words, the effect is to prevent the general definition of "property" at the beginning of the subsection from applying to any earnings, money, or property acquired by a married woman in her business, unless they come within the above restriction—that is to say, unless the business has been carried on by her separately from her husband

He further holds that the words "earnings, money, and property," as so used, cover and include the profits of such a business, and that therefore the restriction as to "earnings, money, or property," applies also to profits, and holds that, as her husband was engaged in the business, the claimant's profits are not protected, but that they, and the goods bought with them, are liable for the husband's debts.

Dealing first with the question of the Jarvis street property. Apparently on the argument before the trial Judge there was no suggestion of the claimant's equitable rights, and, in dealing with the matter, he did so entirely on the common law basis. But it is laid down in a number of cases that a husband may make a gift of property to his wife,

which property, if the gift is completed, will in equity be considered as her separate property, provided that, at the time of so doing, the husband is in a position financially to do it, and does not do it with any object of defrauding his creditors.

In Kent v. Kent, 19 A. R. 352, a married man conveyed lands to his wife by the ordinary statutory deed. They both remained on the land until the wife died. She devised her real estate to two daughters. The widower remaining in possession thereafter until the time of his death, and left a will by which he bequeathed all his property to a second wife. In dealing with the matter in the Court of Appeal, Mr. Justice Osler says, at p. 355: "If the deed to the first wife had been an imperfect gift, her children must fail in their contention that the property had come to them by the first wife's will." He continues, however: "Nevertheless, it is clear beyond controversy that a husband may make a gift to his wife, which, to use the old phrase, though bad at law, will be supported in equity. He may do it in such a manner as to constitute himself a trustee of it for her, and this will be the case where he gives it to her for her own separate use. By so doing he shews that he means her to have the beneficial interest, and that his own beneficial interest shall cease, though the effect of their relationship and legal unity may be that the legal estate is retained by him. So also where property is given to her for her separate use by a person other than the husband, and no trustee is named, the husband will not be permitted to claim it, though the legal estate may be cast upon him by virtue of his marital right. The very fact that the property is given for the wife's separate use, shews that she, and not he, is to have the beneficial interest, and he will therefore be treated as a trustee for her, and her interest will be protected in that manner."

It will be borne in mind that at the time the above case was decided there was no statutory power in Ontario enabling a man to make a valid conveyance direct to his wife of the legal estate in land. Section 21 of ch. 95 of our Revised Statutes of 1892, which was in force when the Jarvis street property was conveyed to the claimant, distinctly enacted that a man might make a valid conveyance or transfer of land to his wife without the intervention of a trustee. That is what happened in this case; and it seems to me that, following the equitable doctrine as to property so given being separate estate, and it being in this case a gift from her husband to the wife, of the legal estate as well as of the equit-

able, she, in equity, took the property free of all rights or claims of the husband.

If I am right in the above, then the fact is immaterial that the conveyance by the wife, through the husband as her attorney, was made prior to the coming into force of the Act of 1900. And further, whether the husband meant Dixon to hold the money in trust for him, or for the claimant, the money was the claimant's separate property, just as the land had been.

It seems to me, therefore, that we must hold that the business was started with the claimant's money.

In the case of Dominion Savings Society v. Kilroy, 14 O. R. 468, the facts were as follows. The husband had failed in business. About 3 years after his failure he made an arrangement with a wholesale firm to furnish goods to his wife, upon her own credit and responsibility. He had a power of attorney from her, to act for her, and he managed the business. She had no capital whatever when the goods were purchased. The business was commenced in premises which were owned by the husband, subject to a mortgage, and the wife paid no rent to any one. Execution creditors of the husband seized the stock in trade, and in an interpleader issue it was held that the stock in trade was not liable to seizure by the husband's creditors. On an appeal to a Divisional Court, Mr. Justice Cameron says, 14 O. R. at p. 476: "To me it seems that where the husband carries on the business, and the wife assists him therein, she has no right to wages and earnings derived from the business, though money of her own may be invested therein, because it is his business, and not hers carried on separately by her. But when the wife procures the goods or provides the money and carries on the business in her own name, though her chief agent or manager is her husband, if he has no right, interest, or control in the business, except what she, as an act of grace, chooses to accord him, the business is hers, carried on by her separately from her husband. . . . The goods were supplied to the wife; the business was carried on in her name by the assistance of her husband, she being incapable, from want of knowledge of it, of carrying on such a business; but the goods could not cease to be hers by this management of the husband, any more than would be the case if a married woman had devised to her a farm with farm cattle and stock, and she employed her husband to drive her horses and cultivate her farm." In that case the decision of the trial Judge in

favour of the claimant was upheld by both the Divisional Court and the Court of Appeal, 15 A. R. 487. The case seems to have turned on the ground that goods, bona fide sold to the wife, could not, in any event, be the husband's property. The question of a stock of goods partly purchased with profits was not dealt with.

In the present case, if my view is right as to the ownership of the $1,300, not only were the goods sold to the wife on her credit; but such capital as had been put into the business was hers.

We next come to the question of the stock in trade having been partly purchased with profits made in the business.

There is in the present case no evidence whatever, as I understand it, of the amount of the profits. But the trial Judge finds, and I think with reason, that there must have been some profits because of the way in which the business grew. But, if the wife was, as I think she was in this case, the owner of the capital put into the business, and that capital remained, as apparently it did, in the business, I cannot see on what ground the goods could be seized because of the fact that some profits were put into the business and thereby increased the capital, even if those profits were the husband's.

I find it difficult to understand why, if the wife may own the corpus of the business, the fact that her husband helped in it, or conducts it for her, should give him the profits.

The decisions holding that to be the law were chiefly what may be called the "farm" cases, in which, though the wives owned the farms, the husbands did all the work of farming. In the case of Ady v. Harris, 9 Man. L. R. 127, Mr. Justice Killam put the matter in this way: "Now it appears to me that where the husband ostensibly carries on, upon the land of his wife, the work of farming, it would be presumed, in the absence of evidence to the contrary, that the wife allows him the use of the land for the purpose, and that the crops are his, and that where, as in the present case, he does the work with the assistance at times of a hired man, the onus is upon the wife, notwithstanding her ownership of the land, to establish that the husband is her servant and the farming business really hers."

That, I think, is as far as the cases have gone.

In Ingram v. Taylor, 46 U. C. R. 52, 7 A. R. 216, the land was the wife's, and the farming business was carried on by hired help, and was intended to be hers, although the husband did some portion of the farm work. In that case

the wife was held to be the owner of the crops as against a creditor of the husband.

The case of a mercantile business seems to me different in this, that the wife's work, where she takes part in it, is something different from the ordinary household duties of a wife, while, in the case of a farm, though she herself may own it, she performs simply the same household duties that she would if the farm were the husband's, and does not plough, sow, or reap, and, therefore, clearly does none of the work that produces the crops, which are the profits.

Coming, however, to the wording of the Act of 1900, which is now ch. 106, R. S. M. 1902, it seems to me that there is a distinct difference from the former Act, ch. 95, R. S. M. 1892. In 1892 the matter was treated of in sec. 14, which said that all the wages and personal earnings of a married woman and any acquisition therefrom and all proceeds and profits of or from any occupation or trade which she carried on separately from her husband, should be free from his debts and disposition.

It was arguable, under the Act of 1892, that where only the profits or proceeds from an occupation carried on separately from her husband are expressly protected by the wording of the statute, the law implies that, in a case where the business is not carried on separately, its proceeds and profits are not protected.

Section 2 (b) of the Act of 1902 says: "The expression 'property' means any real or personal property, of every kind and description, of a married woman, whether acquired before or after the commencement of this Act, and shall include the rents, issues, and profits of any such real or personal property."

So far the description is unrestricted.

Then follows immediately after the above: "And includes also . . . all wages, earnings, money, and property gained or acquired by a married woman in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, and in which her husband has no proprietary interest."

It will be noticed that the word "profits" is used in the unrestricted part of the sub-section, and not in the restricted clause, as it was in the restricted sec. 14 of the Act of 1892.

Are we, therefore, to hold that the expression "earnings, money, and property," in the present restricted clause, includes profits?

It is apparent, I think, that "property" in that expression is used in its ordinary sense, and is not intended to have the wide construction given it by the whole of the clause, which interprets the word "property" for use in construing the other sections of the Act.

Section 5 of the Act of 1902 says that all property standing in the name of a married woman shall be deemed, unless and until the contrary is shewn, to be her property, and that she alone shall be entitled to deal therewith and to receive the rents, issues, dividends, interests, and profits thereof.

It may be argued that the word "profits," as used there and in the unrestricted part of sub-sec. (b) of sec. 2, means only such profits as are ejusdem generis with "rents, issues, dividends, and interests," and should be limited to such accretions as money or property earns in the same way as it does rents or dividends. The point is far from clear. But, considering the above change of the word "profits" from a clause in the old Act, where it was subject to the restriction as to the business being carried on separately from the husband, to sec. 2 of the new one, where no such restriction is imposed, unless by interpreting "earnings, money, and property" as including it, and to sec. 5, where no such restriction is imposed in any way, I am inclined to apply the broader interpretation and to hold that "profits" in secs. 2 and 5 should be held to cover those arising from a combination of skill or work with the earning property or capital as well as to those earned by investments which do not amount to an occupation. If the profits gained in a business carried on by the wife with her husband's help were intended by the legislature to remain unprotected, one would expect to find them named specifically in the limiting part of sec. 2 (b), in the same way as they were in sec. 14 of the former Act.

There is sometimes, I venture to think, too great a tendency in Courts to construe strictly Acts that are in derogation of common law rights, and to pay too little attention to the progressive tendency of legislation, which, by successive enactments from time to time, gradually curtails those rights.

New legislation from time to time as to married women's property has been steadily in the direction of broadening their rights in such property. In cases of widening of such enabling statutes by new and more comprehensive enactments, former opinions of Judges given under less progressive Acts, and consciously or unconsciously influenced by still earlier decisions under earlier Acts or under the common law itself, are

often followed until a time comes when Courts feel bound to break away from them and deal with new matters simply on the then existing Acts as if there were no precedents.

With every deference to the ability and legal knowledge of those who have given such former decisions, I think that such a time has arrived in the history of our legislation as to married women's rights.

It seems to me further that humanity requires that where a married woman bona fide starts in business for herself, and owns, as the claimant did here, the corpus of the business, and the business was not merely the husband's, though carried on in her name, we should, unless the statute distinctly states the contrary, hold that the profits also are hers. Owing to the fact that the profits are now dealt with as above by enactments in one of which there is no restriction as to how they are acquired further than that they are acquired from the wife's property, and in the other of which there is also no restriction unless by holding "earnings, money, and property" to include profits (a holding which I do not think the Act forces on us), I cannot see my way to arriving at the conclusion that the trial Judge did. With much deference, therefore, to his opinion, I think it should be held that the profits made by the business, as well as the corpus or capital in the business, were hers. It follows necessarily from such a holding that when those profits were put back into capital they still continued hers.

I do not see, therefore, either that the execution creditor had any right to seize these goods, or that he would have any right to have a receiver appointed and an inquiry as to what portions of their value, or what portion of the goods themselves, were got with profits. I would reverse the decision of the trial Judge and enter judgment for the claimant, the plaintiff, in the interpleader issue.

PHIPPEN, J.A.:—I express no opinion as to the right of a married woman to profits arising from a business not carried on separately from her husband. Otherwise I agree with the judgment of my brother Richards. The appeal should be allowed.

HOWELL, C.J.A., and PERDUE, J.A., concurred in the result of the appeal.

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

RE CANADIAN NORTHERN R. W. CO. AND ROBINSON.

Railway—Expropriation of Land—Compensation to Landowner—Arbitration and Award——Railway Act—Appeal from Award—Principle of Decision—Value of Land for Business Purposes — Percentage Deductions — Track Facilities—Extra Haulage — Contingent Damages—Improvements—Interest.

Two appeals, heard together, from an award rendered by arbitrators.

The claimant, Robinson, had a wood and lumber yard adjoining or near the company's railway yard at Winnipeg. His property consisted, first, of several lots and portions of lots, which, with a lane (included in the property) formed a triangle, with a frontage on Wesley street of 266¾ feet. The total area of the triangle was slightly greater than would be the area of an oblong block of lots, of 266¾ feet frontage both on Wesley street and on the lane in rear. There were also two lots, numbered 35 and 38, not adjoining each other or the triangle (each of them being across Wesley street from a portion of the frontage of the triangle), but used as part of the same yard property with the triangle. There was a spur track from the company's lines to the southerly side of the triangle, and lot 38 was immediately opposite that portion of the triangle upon which this spur stood. The claimant had tried to get a spur track put in across the street to lot 38, but had not succeeded in doing so, although he had obtained a resolution of the city council consenting to his doing so.

The company took proceedings to acquire the land by expropriation under the provisions of the Railway Act. The claimant obtained from the Board of Railway Commissioners an order allowing him to retain possession until 1st May, 1907. On 11th July, 1907, two of the arbitrators,

Messrs. Macdonald and Galt, made the award, the third arbitrator, Mr. Christie, having declined to sign it.

The arbitrators allowed the following sums to the claimant: $97,440 for the land; $5,350 for the improvements; and $10,000, to cover additional cost to which, they estimated, the claimant would be put during two years after leaving the property, in the haulage in connection with his business. They also allowed him the sum of $939.88, being interest at 5 per cent. from 1st May, 1907 (the date to which the Railway Commissioners had permitted the claimant to stay), to 1st July, 1907; making a total of $113,-729.88.

Both parties appealed from the award to the Court of Appeal.

The appeal was heard by RICHARDS, PERDUE, and PHIPPEN, JJ.A.

I. Pitblado and A. B. Hudson, for the claimant.

J. H. Munson, K.C., and A. H. Clark, K.C., for the company.

RICHARDS, J.A.:—After hearing and considering the evidence, and before the award was made, each arbitrator put his views of the matter in writing, and submitted them to the others for consideration. A copy of the views of each of the arbitrators was put before us on this appeal. They were, by consent of both parties, to be considered as shewing how each arbitrator arrived at his opinion, in the same manner as if they were statements made on examination of the arbitrators under oath.

It is alleged by the claimant that, in arriving at the amount allowed him for the land, the arbitrators wrongfully, because of the bulk of the property being in triangular shape, took 20 per cent. off what they found to be the value of the triangle to him for his business purposes.

He also contends that they wrongfully took 20 per cent. off the value which they placed on lot 38, because, after valuing it as if the spur track extended to it, they computed that such spur track would have taken off about 20 per cent. of the area of the lot.

The company objected on a number of grounds.

They consider that the bulk of the evidence shewed the property not to be so valuable as the arbitrators found it even after taking off the 20 per cent.

They also said that the claimant should not be allowed for lot 38, as if it had track facilities.

They further contend that the $10,000, separately allowed with regard to extra haulage during the two years after the claimant had to leave the property, has, in fact, been taken into consideration, and allowed for, in arriving at the price of the land.

They further allege that the arbitrators acted on a wrong principle in allowing the interest from 1st May to 1st July.

The following is a copy of Mr. Galt's written opinion referred to above:

"In my opinion, this property, considered merely as land, is not very valuable. It is true that it is central and very near Main street, but, being isolated and hidden away, I cannot regard it as desirable for business purposes.

"The shape of the triangular piece, which is about three-quarters of the whole, also greatly reduces its value.

"While this is the case, there is no doubt the property is of great value to Robinson, and for his business is about as good as the land he has recently purchased at $350 per front foot on Victoria street. The statement that such valuable property cannot be profitably used for a fuel and lumber yard, is not borne out by the evidence, and the fact that Robinson has paid this price for another yard, conclusively disposes of this argument.

"It appears to me that Robinson should not be called upon to make a loss. If there is reasonable doubt, he is entitled to it, and we must see that he is left in as good a position as before the expropriation of his property. If, however, he is allowed a higher price for his land than its fair market value, on the ground that it is as valuable to him as the more expensive property, he should not expect to be paid the other items of his statement in full.

"Contingent damages are extremely difficult to estimate, and there is much doubt in my mind as to what items are admissible and inadmissible. I propose, therefore, as a set-off against the items that are admissible, to value the triangular piece of property practically on the basis of the land he has recently purchased, with a reduction of 20 per cent. for its shape.

"There is something in the contention that for Robinson's business the triangular piece of land is as valuable as if it were square, but I cannot ignore the fact that

its real value is much less. I propose valuing lot No. 38 on the same basis. The land has at present no track, but I see no reason why the spur should not be taken across Wesley street. The reduction of 20 per cent. is because the track, if extended, would reduce its frontage area about this amount.

"The lot No. 35, I value at $175 per foot, which, as the track could not be brought to it, is, I consider, a fair price.

"I allow the full amount of money claimed for improvements, less $1,500 legal expenses, which should not be considered, as it was owing to the success of these legal proceedings that the property has its present value.

"These improvements are not worth this amount, but I think it fair to place Robinson in his new yard with equal facilities for doing business, and let the fact that they are new stand against the cost of the removal.

"I shall allow the further amount of $10,000 for extra cost of doing business in a different location. The evidence shews that the property he has recently acquired is not large enough and he will have to have an additional yard. The evidence also shews that the land on George street is the nearest track property of sufficient size he can obtain, and that the actual cost of teaming to his customers from this point is quite $5,000 per year. I consider that two years is a fair time to give him to adjust his business to the new conditions, and therefore award $10,000.

"I cannot allow the claim for compulsory sale, because I consider he is being paid a good price for the land.

"I cannot allow interest, because the land has not been taken over, and apparently there is no legal justification for doing so.

"I cannot allow the loss of business for the reason already stated."

Judging from the fact that, except as to the interest, the award is exactly for the amount which it would work out at on Mr. Galt's reasoning, I think it fairly conclusive that, except as to the allowance of interest, that reasoning was followed by himself and Mr. Macdonald in making the award.

Dealing with the question of the evidence, it seems to me settled by the case of Atlantic and North West R. W. Co. v. Wood, [1895] A. C. 257, that it was not the intention

of the legislature, by sec. 209 of the Railway Act, that a Court of Appeal should consider all the evidence de novo.

In the above case Lord Shand, in giving the judgment as to the interpretation of this same section, 209 (which at that time was sec. 161 of the Railway Act of 1888), says, at p. 263: "It would be a strained and unreasonable reading of the words of the statute 'as in a case of original jurisdiction' to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the statute would really make the Court the arbitrators and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the legislature, and that what was intended by the statute was not that the Court should entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award made by them on its merits on the facts as well as the law." Lord Shand adds to the above: "And it is worthy of notice that the enacting words of sub-sec. (2) of sec. 161 are followed by this provision of sub-sec. (3); 'Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from a decision of an inferior court to the said Court.'"

The sub-sec. (3) referred to by Lord Shand is sub-sec. (2) of sec. 209 of the present Act.

In view of the above decision, I consider that we must treat the decision of the arbitrators, if not as that of a jury, at least as we would that of a Judge of first instance; and, so doing, there is plenty of evidence to support their finding as to the value of the land to the claimant.

Mr. Galt says, as to lot 38, that he values it at the same figure per foot frontage as he does the triangle, because of its having the right to track facilities. The evidence does not, I think, support him in the view that the claimant was entitled to the extension of the spur track across Wesley street to this lot. I think, however, that the arbitrators should not have treated it, or lot 35, as a separate property from the triangle. While actually divided by the street from the triangle, they were part of the claimant's

same wood yard. In point of distance, lot 38 is nearer to the end of the spur track than a large part of the triangle is, and should, I think, have been held nearly as valuable as the triangle itself. For that reason, and for the reasons I am about to state, I would not disturb the arbitrators' finding as to its value.

The claim of the railway company that the $10,000 allowed for extra haulage is also included in the price of the land, seems to me to fail, and should not be upheld if I am right in the view I take that the arbitrators, in finding the value of the land, did not include any contingent claim of any kind.

As to the contention that interest should not have been allowed the claimant, I think the railway company's contention should be upheld, though it is probable that from 1st May to 1st July the claimant's possession was not of as much use to him as it would be during that same period of the year if it were intended that he should continue the owner of the land.

The question of interest has been dealt with in a number of cases, though the circumstances do not seem, in any of them, to be similar to those of this case. In Re Leak and City of Toronto, 26 A. R. 351, 30 S. C. R. 321, the claim was not for the taking of land of the claimant, but for injuries done to the claimant's land by the city's works, and, although the damages were ascertained at a considerable length of time after the injury was done, the Courts held that no interest could be allowed on the amount so ascertained, because the claim was in the nature of one for a tort, and, by the ordinary rule of law, such claims do not bear interest.

It was held by Sir John Romilly in Regent's Canal Co. v. Ware, 23 Beav. 575, that the compulsory notice of intention to expropriate, and the subsequent settling of the price to be paid, make a statutory contract for the sale of the land, and that decision has been upheld in the subsequent cases.

In In re Eccleshill Local Board, 13 Ch. D. 365, the claimants were reversioners. Their tenants were in possession. The amount of compensation for taking was ascertained by a jury, under the provisions of English law. Some considerable delay arose, on the part of the Board, in taking possession, owing to questions as to the sufficiency of the reversioners' title. Nevertheless, it was held that the

reversioners could claim interest on the amount of the verdict from the time it was rendered.

That holding was questioned by Sir George Jessel in In re Pigott and Great Western R. W. Co., 18 Ch. D. 154, where he held the company liable for interest only from the time when they might prudently have taken possession, though that happened some time after the award was made.

In the present case the statutory contract could not be complete until the award was made on 11th July; and, though the claimant had but little valuable use for the land during the period from 1st May to 1st July, yet he was in possession during that period. I am unable, therefore, to see on what principle interest could be allowed. The arbitrators might, perhaps, have made him an allowance for disturbance to his business during that period; but they have not done so, and, as they are not obliged to do so, I do not see that we could treat as compensation of that kind this sum they allowed as interest.

The claimant contends that, as the $350 per foot frontage on the triangle has been found to be its actual value to him, the arbitrators acted on a wrong principle in taking off the 20 per cent. because of the shape of the land.

He further contends that, there being track facilities to the triangle, and lot 35 being part of the yard, lot 35 should also have been valued as if it had track facilities, and not at only half of the value per foot frontage placed on lot 38.

And, thirdly, he sets up that, in addition to allowing him for the value of the land to him, the arbitrators should have allowed him a further sum equal to 10 per cent. of that value, as compensation for having to submit to the compulsory taking.

As to the first contention, the law, I think, is distinct that, in case of a compulsory taking of land in the way this has been taken, the price should be fixed at its actual value to the occupier, or owner, making the claim.

In Ricket v. Metropolitan R. W. Co., L. R. 2 H. L. at p. 205, Lord Westbury states the principle as follows: "It is clear that if the railway company, in the exercise of its statutory power, took the public house entirely, it would have to pay for it according to its value as a public house, and the interest of the occupier therein would be estimated with reference to the value of the custom of the public house . . . The trade or custom is a thing appertaining

to the premises and not to the person of the occupier, but all things pertaining to the premises are part of the premises and included in the interest of the occupier."

In Commissioners of Inland Revenue v. Glasgow and South Western R. W. Co., 12 App. Cas. 321, Lord Halsbury says. "In treating of that value, the value under the circumstances to the person who was compelled to sell (because the statute compels him to do so) may be naturally and properly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill taken from the person' are used in a loose and general sense they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business, but in strictness the thing that is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation."

The same principle was followed by Mr. Justice Burbidge in the case The King v. Rogers, 6 Can. Ry. Cas. 409. In that case the Crown expropriated a hotel, licensed to sell liquors. The license was an annual one. It could be renewed in favour of the owner, or, if he died, of his widow; but no license could be granted to any other person. If the owner sold the property, the use to which he put it could not be continued. The learned Judge held that, while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, and that such was an element to be considered in determining the amount of compensation to be paid.

From the foregoing it seems to me clear that the amount that should have been allowed the claimant was its value to him. The third and sixth paragraphs of Mr. Galt's reasons seem to me to shew that the arbitrators held that the value to the claimant was $350 per foot frontage. If so, they would have been right in allowing it. When they departed from this, however, as it seems to me that Mr. Galt's statement shews that they did, to ascertain and allow only the ordinary selling value of the property, they acted on an incorrect principle. I would increase the amount allowed, in respect of the triangle, by restoring to it the 20 per cent which the arbitrators took off.

Then as to lot 38. It is as near to the track facilities on the triangle as some parts of the triangle itself are; but, on the other hand, no part of it actually adjoins the spur track; so that the haul to it is, perhaps, on the average, further than the haul to the different parts of the triangle, because those portions of the triangle adjoining the spur track would probably be used the most. On that consideration, I do not think that, if it were not for the way in which the value of lot 35 has been arrived at, I would reinstate the 20 per cent. taken off the value of lot 38.

Lot 35 is, as already stated, also part of the one property with the triangle, although not exactly adjoining it. It is, however, across the street from part of the triangle, and it undoubtedly got the benefit of the spur track, although not to the same extent as lot 38 did. I think it should have been valued on that principle, and that the arbitrators, therefore, did not allow enough for it when they only put it at half of the value of lot 38; that is, at $175 per foot.

As the arbitrators have, I think, undervalued this lot 35, while possibly overvaluing, to some extent, lot 38, when putting it as of the same value per foot frontage as they did the triangle, it seems to me that a fair way to deal with the matter would be to reinstate the 20 per cent. taken off lot 38 and to leave lot 35 as it stands. I think the result would be about the same as if both lots were properly valued.

As to the 10 per cent. which, it is contended, should have been added for compulsory taking. There has grown up in England a custom of allowing 10 per cent. under such circumstances as these. But I do not look upon such an allowance as being one which the arbitrators were necessarily bound to make, and, therefore, while they might have given it, had they chosen, I do not, in the absence of direct evidence that they meant to do so, see my way to interfere by now allowing it.

The result of my opinion, therefore, is that the 20 per cent. taken off the value of the triangle and lot 38 should be reinstated and added to the amount allowed the claimant by the award, and that the interest allowed the claimant should be disallowed and taken off the amount allowed by the award, and that the amount of the award should be altered accordingly.

PERDUE, J.A.:—This was an appeal and cross-appeal from the award of arbitrators appointed under the provisions of the Railway Act to settle the amount of compensation to be allowed for lands taken for railway purposes. The land comprised a triangular block and two lots near the Canadian Northern Railway station in the city of Winnipeg. The triangular block was provided with track facilities, and had, along with the two lots in question, been used for some time by the owners as a coal and wood yard.

The board of arbitrators appointed in this case was an exceptionally strong one. It comprised three well known business men of high standing and great experience. The amount involved was very large. A great mass of evidence was received, and exceptional care seems to have been taken in making up the award. The total amount awarded by way of compensation for the taking of the lands was $112,790, and interest at 5 per cent. per annum was allowed from 1st May, 1907, to 1st July, 1907, amounting to $939.88. The award was signed by Mr. Galt and Mr. Macdonald, two of the arbitrators, Mr. Christie, the arbitrator appointed on behalf of the railway company, declining to sign.

Each arbitrator had drawn up a memorandum in writing setting out his views and stating the amount which, in his opinion, should be awarded. These documents were before the Court as part of the material used on the appeal. It was plain that the views of Mr. Galt, the third arbitrator, as to the amount to be awarded, were those which were finally acceded to by Mr. Macdonald and embodied in the award.

On the appeal the owner of the property contended that he had only been allowed the market value of the same, instead of being allowed what it was worth to him, and that he had not been awarded anything for compulsory taking of the land. The basis of this contention was Mr. Galt's memorandum shewing how he arrived at the amounts mentioned in it, which amounts had been adopted for the purposes of the award. It was contended that he, after arriving at a valuation of $350 a front foot for the triangular block, had deducted 20 per cent. from such valuation on account of the triangular shape of the property. There was sufficient land in the triangular portion to form a rectangular piece of land of the depth of a lot and as long as the side of the triangle fronting upon Wesley street, or about 266

feet. It was contended that the shape of the land was no detriment when the land was used, as it had been, for a coal and wood yard, and that it was as valuable to the owner for his purposes as a rectangular piece of the same area.

After a careful consideration of Mr. Galt's memorandum, I think his meaning was that the land was worth to the owner the price he has placed upon it, not that that was its market value. He expressly states the opinion that the property, considered merely as land, is not very valuable. He does not regard it as desirable for business purposes, and therefore its market value is not high.

The owner had recently purchased two lots on Victoria street for a yard, paying $350 a front foot for 100 feet. Mr. Galt says that for the business of the owner the land in question is about as good as the land on Victoria street. He does not say, however, that the whole triangle of land in question should therefore be valued at $350 a front foot. He only proposes to allow that price with a deduction of 20 per cent. on account of the shape of the land. His meaning, I think, is that if 20 per cent. be deducted from the triangle on account of its shape the balance will be as valuable, foot for foot, for the purposes of the owner, as the Victoria street land. He evidently intended that the price he fixed should cover all claims for the taking of the land, except for improvements and increased cost of doing business in a different location. The claim for compulsory sale was refused because he considered the owner was being paid a good price for his land. The valuation allowed was, in Mr. Galt's opinion, high enough to cover the value to the owner and also the claim in respect of a compulsory sale.

The property in question was, on account of its position, exceedingly hard to value. No similar property had been placed on the market. The valuations of the triangular portion made by real estate experts who gave evidence, ranged from $40,000 to $133,500, or from $150 to $500 a front foot on a frontage of 266 feet. The arbitrators were capable men, and they seem to have given much time and attention to the matter. Unless they manifestly erred in some principle in arriving at their conclusion, their award should not be disturbed. I do not think there was any sufficient ground shewn for interfering with the valuation they placed on the land or the amount allowed for improvements and for injury to business.

The interest awarded by the arbitrators upon the amount found due for compensation must be disallowed. At the time the award was made the owner was still in use and occupation of the land. It may be that the proceedings taken by the railway company had interfered with the business of the claimants by rendering the tenure of the land uncertain, thereby curtailing their operations. But a claim for this loss, if any, could only be dealt with by the arbitrators when making up the amount of the compensation to be allowed. It is not a justification for adding interest upon the amount awarded. The arbitrators should make up the amount to be awarded and should not add interest upon that amount or declare that it shall carry interest. I would refer to Re Leak and City of Toronto, 26 A. R. 351, affirmed in the Supreme Court of Canada, 30 S. C. R. 321.

The item of $939.88 for interest should, therefore, be struck out, and the amount of the compensation awarded left at the sum of $112,790, but in other respects the award should stand. The appeal of Robinson should be dismissed. The Canadian Northern Railway Co. will be allowed $100 to cover all costs in respect of the item as to which they succeed.

PHIPPEN, J.A.:—I concur in the judgment of my brother Perdue.

The best opinion I can form of Mr. Galt's memorandum, which, apart from interest, was undoubtedly the basis of the award, is that he endeavoured to allow Mr. Robinson what he believed to be full compensation for all damage caused by the taking of his property, not on the basis of the selling price of the land, but having regard to its worth to Mr. Robinson for business purposes. Mr. Galt does make reference to two matters with which, were they the real basis of the award, I might disagree; namely, the deduction of the 20 per cent. for the shape of the larger property and the valuation of lot 38 as a track lot.

Lot 38 is not a track property. On the other hand, if the triangle is worth to Mr. Robinson for business purposes more than its sale price, he is entitled to the higher value, regardless of its shape. I do not think, however, Mr. Galt intended, in deducting the 20 per cent. and in allowing lot 38 as track property, to do otherwise than carry out the principle which he lays down in the earlier part of

his memorandum, of allowing Mr. Robinson adequate compensation for the loss sustained.

This being so, I hesitate before interfering with the award. The arbitrators are men of experience and business ability; they have had the advantage of hearing the evidence; and their judgment in determining compensation for a business loss (because this and not the market worth of the property is the true issue) is entitled to the greatest respect. As I believe they adopted the principle that Mr. Robinson should be fairly compensated for his loss, I cannot interfere with their decision, even if in reaching their conclusions they use expressions which, unmodified, might amount to legal error. In the view I take of the memorandum, to give effect to either objection would necessitate a new arbitration, or an investigation of the whole case de novo.

These remarks do not apply to the question of interest, which was allowed as a separate damage and not as part of the compensation for direct business disturbance.

In order to expropriate this property it was necessary for the company to obtain an order from the Railway Commissioners. This order provided that the company should not disturb possession before 1st May. In their award the arbitrators state: "We allow interest from the 1st day of May, A.D. 1907, by reason of the provision in the said order made by the Board of Railway Commissioners of Canada, entitling the claimant to retain possession of the property until that date." The question of interest is not dealt with in Mr. Galt's memorandum, but appears to have been allowed in the award as an afterthought.

I am unable to accept the argument of the owner's counsel, adopted by the arbitrators, that the order of expropriation affects the company's liability in respect of interest. At the time the order was applied for, Mr. Robinson was carrying on business on the property about to be taken. Had the railway company proceeded actively, it appeared possible that Mr. Robinson might be dispossessed most inconveniently. To protect him, the order provided that he should not be disturbed in possession until 1st May.

This provision was made for the owner's protection. It is a limitation only on the right of expropriation, and, while it insures to Mr. Robinson certain enjoyment, it

does not purport, except by limitation, to alter the time or the terms of the company's possession.

The right of arbitrators to award interest must, to my mind, be determined by the provisions of the Railway Act. These powers are purely statutory. If the Act empowers their award, the award must stand, but equitable considerations will not alter or extend their statutory jurisdiction.

The sections of the Act bearing on the question are in part as follows:—

192. (2) "The date of such deposit (referring to the deposit of the plan) shall be the date with reference to which such compensation or damages shall be ascertained."

197. "The arbitrators . . shall be sworn . . faithfully and impartially to perform the duties of their office, and shall proceed to ascertain such compensation in such way as he or a majority of them deem best."

210. (Referriug to a time after the making of the award): "If the company has reason to fear . . the company may pay such compensation into Court with interest thereon for 6 months, and may deliver to the clerk or prothonotary." etc.

(2) "Such conveyance or award shall thereafter be deemed to be the title of the company to the land therein mentioned."

213. "The compensation for any lands which may be taken without the consent of the owner shall stand in the stead of such lands."

214. (3) "If the order for payment is obtained within less than 6 months from the payment of compensation into Court, the Court shall direct a proportionate part of the interest to be returned to the company."

215. "Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon the payment into Court of the amount of such compensation, in the manner hereinbefore mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon."

The Act does not authorize the company to take possession until the amount of the award is paid either to

the owner or into Court. It proceeds upon the assumption that the owner shall retain possession until payment, and if the right to possession is taken by deposit in Court, instead of by being directly given to the owner, that the railway company shall pay interest from the date of payment of the money into Court until such time, within 6 months thereafter, as the money shall be distributed.

The only power conferred upon the arbitrators is to fix the damage, as of the date of filing the plans. Damages thereafter developed are beyond their control. The issue is simply the value of the property on that date for business purposes, if used for such, otherwise in fair market, and beyond this point, which the statute has fixed, neither law nor inclination will rightly carry us.

Some learned Judges dealing with similar questions appear to have attached importance to the date of possession. The circumstances under which these cases were decided doubtless justified the judgments, but the cases are not, to my mind, precedents under our present Railway Act.

A railway company can only take possession before payment of the arbitrated compensation in one of two ways: by agreement, express or implied, or as a trespasser. If possession is under contract, we must refer to the agreement to ascertain the penalties for its favours. If by trespass, the liability is not to pay interest until the making of the award, but rather in damages, the amount of which must depend on the conditions of each case. The penalty for such a trespass must be determined by the Courts. It is not a subject for arbitration under the Act. The duty of the arbitrators is to fix the damages as of the date of the filing, not the compensation for subsequent torts. And in doing this they are limited by the terms of the Act. I am unable to concur with the judgment of Mr. Justice Riddell in Re Cavanagh and Canada Atlantic R. W. Co., 14 O. L. R. 530, 9 O. W. R. 842. Whether the award itself carries interest does not arise on this appeal.

ALBERTA.

SCOTT, J. FEBRUARY 6TH, 1908.

SINGLE COURT.

GOODE v. CITY OF EDMONTON.

Liquor License Ordinance — Hotel License — Amount of License Fee in City — Territorial Duty — Payment to Municipality—Construction of Ordinance — Amendment —By-law—Construction.

Motion by plaintiff for judgment upon a special case stated by the parties. The action was brought for the recovery of $200, in the circumstances stated in the judgment.

J. R. Boyle, for plaintiff.

J. C. F. Bown, K.C., for defendants.

SCOTT, J.:—Plaintiff is a hotel-keeper and the holder of a license under the Liquor License Ordinance in respect of the Imperial hotel in Edmonton, which license expired on 30th June, 1907. Before its expiry he applied to the license commissioners for a renewal thereof for one year, and they approved of his application. On 9th June, 1907, he tendered to the defendants $200, and requested a certificate pursuant to sec. 46 of the Ordinance referred to. His tender was refused, and the payment of $400 was demanded as a condition of obtaining the issue of the certificate.

Plaintiff paid the $400 under protest and with notice that he would bring an action to recover the excess over $200.

The question to be determined is: Had the defendants power and authority to collect from plaintiff a sum in excess of $200 before issuing to him a certificate required by the section referred to?

The special case provides that, if the Court should be of opinion that the defendants were not entitled to demand more than $200, under the circumstances stated, judgment should be entered for the plaintiff for $200 and costs; otherwise for the defendants with costs.

Section 46 of the Ordinance referred to provides that every person to whom a hotel license shall be granted, shall, before receiving such license, be required to pay $200 as a fee for such license, in addition to any fee required to be paid to the incorporated city or town in which the license is required to be granted. It further provides that incorporated cities or towns having made appointments under sec. 11 of the Ordinance might, by by-law, require each licensee to pay towards their municipal revenue such sums as they might determine, not exceeding the amount of the territorial duty payable on such license, and that the Attorney-General should in no case issue such license until he received a certificate from the treasurer or clerk of the municipality shewing the amount of such fees, and that such sum had been paid. It also provides that such by-law and every substituted and amended by-law shall be promptly certified and forwarded to the Attorney-General, and shall continue in force until amended, altered, or repealed, without being re-enacted each year.

The only by-law passed by the defendants respecting the fees to be charged by them under sec. 46 was passed on 5th June, 1900. In addition to appointing an inspector under sec. 11, it provided as follows: "Every person to whom a license to sell intoxicating liquors within the town of Edmonton, whether such license be a hotel license or a wholesale license, is to be granted under the Liquor License Ordinance, shall, before receiving the same, pay to the secretary-treasurer of the town towards the general revenue fund of the municipality a license fee equal to the amount of the territorial duty payable on such license."

Section 46 of the Ordinance was amended by sec. 42 of ch. 9 of the statutes of 1907, which came into force on 1st July, 1907. The effect of that amendment, so far as material to the question to be determined, is that, in cities having 10,000 inhabitants or over, the territorial license fee for hotels shall be $400, and in other places $200.

I am of the opinion that the by-law referred to cannot have the effect of increasing the municipal license fee beyond the amount of the territorial fee prescribed by the Ordinance in force at the time the by-law was passed. From the wording of the by-law, it must be assumed that the council, in passing it, was legislating with respect to the then existing law, and was not contemplating the effect of any future amendments of that law. I think that it cannot reasonably

be assumed that the council intended that thereafter the amount of the municipal license fee should be fixed and determined by the legislature, and not by the city. Yet that would be the result if the effect of the by-law were to increase the municipal fee. Words of much wider signification would, in my view, have to be used in order to give it that effect.

The effect of the by-law is to impose a charge upon those applying for licenses under the Ordinance, and, such being the case, it must be strictly construed as against the city. In Regina v. Barclay, 8 Q. B. D., Field, J., says at p. 312: "It is a very well established rule for the construction of statutes, that, if they impose a charge on the subject, they must be strictly construed as against the party in whose favour the charge is imposed."

I see no reason why the rules relating to the construction of the statutes should not be applicable to municipal by-laws.

For the reasons I have stated, I answer the question submitted in the negative, and I give judgment for the plaintiff with costs.

ALBERTA.

BECK, J. FEBRUARY 7TH, 1908.

TRIAL.

SCHURMAN v. EWING AND MOORE.

Vendor and Purchaser—Contract for Sale of Land—Purchase Money Payable by Instalments — Resale by Purchaser—Default in Payment of Instalment—Action by Vendor against Purchaser and Sub-purchaser—Forfeiture —Recovery of Instalment — Cancellation of Contract—Parties—Leave to Sub-purchaser to Apply.

Action by Schurman, vendor, against Ewing, purchaser from him, and Moore, purchaser from Ewing. The statement of claim alleged an agreement of sale, dated 28th November, 1906, of the lands in question, for the price of $5,000, of which $2,500 was paid in cash as down payment,

and the balance was payable "in two equal instalments in 6 and 12 months respectively from the date of the agreement, with interest thereon at the rate of 8 per cent. per annum, payable with each instalment of principal." It alleged sale of the land to Moore for $4,000, and the assumption by Moore of the balance owing by Ewing to Schurman. It alleged default in payment of the instalment and interest which fell due on 28th May, 1907.

It set out verbatim a clause providing for cancellation and forfeiture similar to that which in the recent case of Great West Lumber Co. v. Wilkins, ante 166, was held to be void. It alleged notice to Ewing that default had been made, and also that "on or about 15th August, 1907, the plaintiff delivered to the defendant Ewing by registered letter a written notice as provided" in the clause just referred to.

It alleged damages, by reason of the failure of the defendants to complete, to the extent of $2,500, by depreciation in the value of the property.

It claimed: (1) payment of $2,500 and interest; (2) an order declaring the agreement between Schurman and Ewing null and void, and any moneys paid thereunder forfeited to the plaintiff, or in the alternative sale or possession; (3) further and other relief; and (4) costs.

The action was commenced on 1st October, 1907, that is to say, before the last instalment of principal fell due.

The defendant Moore did not enter an appearance. The defendant Ewing appeared and put in a defence, claiming that in case the plaintiff recovered judgment against him, the plaintiff, upon the defendant Ewing making payment, should transfer the land to him free of all incumbrances, and claiming by the way of cross-relief against the defendant Moore payment of the amount of any judgment the plaintiff might obtain against him, with interest and costs, and in default an order declaring the land and all payments made to Ewing forfeited to him.

This defence and claim for cross-relief was served upon the plaintiff and the defendant Moore with a notice of motion for an order in accordance with it.

W. G. Harrison, for plaintiff.

S. E. Bolton, for defendant Ewing.

Defendant Moore did not appear.

BECK, J.:—For the reasons indicated in Great West Lumber Co. v. Wilkins, I refuse to make any order founded on the forfeiture clause.

Then what is the plaintiff entitled to?

Laird v. Pim, 7 M. & W. 474, 10 L. J. Ex. 259, 8 Dowl. P. C. 860, 56 R. R. 768, was an action at law by a vendor against a purchaser. The purchaser promised to pay the purchase price as soon as the conveyance should be executed, in the meantime the price to bear interest payable yearly, and the purchaser to have liberty to make bricks and erect steam engines on the land. The declaration alleged a tender by the vendor of a conveyance and a refusal by the purchaser to accept the conveyance and to pay the purchase money. On demurrer it was held that on this allegation the vendor was "substantially in the same situation for the purpose of recovering the money as if all had been done on his part which he engaged to do. It does not follow that he shall recover the whole purchase money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price as if all had been done by him:" per Parke, B. At the trial Rolfe, B., was "of opinion that the plaintiff could not recover the whole purchase money, but was entitled to such damages only as had resulted from the defendant's breach of contract, and a verdict was accordingly taken for the plaintiff for £750, made up as follows: £680 for interest on the purchase money up to the commencement of the action and £70 for the value of the brick clay taken by the defendants." A motion was made in term, pursuant to leave reserved, for a rule to shew cause why the damages should not be increased to the amount of the purchase money. The rule was refused. Alderson, B., said: "It is like the case of goods bargained and sold, and an action brought for not accepting them, in which case the damages sustained by the breach of the contract can alone be recovered." In reply to the contention of counsel that "there the plaintiff treats the goods as still his own," Parke, B., said: "So here the land is still yours at law." In giving judgment Parke, B., said: "The measure of damages in an action of this nature is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land or the loss of the purchase money in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too. A party

cannot recover the full value of a chattel unless under circumstances which import that the property has passed to the defendant as in the case of goods sold and delivered where they have been absolutely parted with and cannot be sold again. In Yates v. Gardner, 20 L. J. Ex. 326, in which the agreement of the purchaser was to pay the whole purchase price on a stated day, Parke, B., said: "The defendant in this case agrees to pay the purchase money of the land on the 1st January, without a conveyance: he is therefore bound to pay it, and a tender of a conveyance need not be averred. This case differs from Laird v. Pim, inasmuch as in that case the money was not to be paid until the conveyance was completed, but here the defendant agrees to pay in advance, and relies upon the plaintiff afterwards giving him a conveyance."

Laird v. Pim was decided by Gurney, B., Alderson, B., Parke, B., and Rolfe, B.: Yates v. Gardiner by Alderson, B., Parke, B., Platt, B., and Martin, B.

Guardians of East London Union v. Metropolitan R. W. Co., L. R. 4 Ex. 309, was an action to recover the amount of compensation fixed by award under statutory expropriation powers, where a conveyance had not been executed. Counsel for the defendants contended "that the common law rule applied, that before requiring payment of the price of anything sold, the property in the thing must be transferred; until transfer the remedy is only in damages for breach of contract, and the Court (Bramwell, Channell, and Cleasby, BB.), on the argument of a demurrer, agreed with this contention, and "held that the rule laid down in Laird v. Pim applied."

Wilks v. Smith, 10 M. & W. 355, Dicker v. Jacker, 6 C. B. 103, Mattock v. Kinglake, 10 A. & E. 50, are cases in which a conclusion similar to that in Yates v. Gardiner was reached, on the ground of the rule laid down in the notes to Pordage v. Cole, 1 Wms. Saund. 320: "If a day be appointed for payment of money or part of it or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act before performance: for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act."

The law was laid down in Laird v. Pim as being the same, with regard to the measure of damages, in the case of land as in the case of goods.

"When the seller has not transferred to the buyer the property in the goods . . . the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer (as a general rule) is for damages for non-acceptance. He can, in general, only recover the damages that he has sustained, not the full price of the goods:" Benjamin on Sales, 5th ed., p. 805; Sale of Goods Act (Imp.), sec. 50; Sales of Goods Ordinance, C. O. 1898 ch. 39, sec. 48. However, "where, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract:" Sales of Goods Act (Imp.), sec. 49 (2); Sales of Goods Ordinance, C. O. 1898 ch. 39, sec. 47 (2): Dunlop v. Grote, 2 C. & K. 153.

It, therefore, appears that the exception from the general rule of Laird v. Pim, laid down in Yates v. Gardiner with respect to land, is merely the recognition of a like exception existing with respect also to goods.

Contrary to my first impression, and notwithstanding a very strong desire in the interests, as I think, of justice, I am forced to the opinion that the contract in the present case comes within the exception of Yates v. Gardiner, not within the general rule of Laird v. Pim, and therefore that the plaintiff is entitled to recover from the defendant Ewing the whole amount of the first deferred instalment of principle, with accrued interest, if he is willing to discontinue his action in all other respects. I do not think he is entitled to an order for payment, and also at the same time an order for the purpose of proceeding to cancel the agreement. By taking a personal order for judgment he would be continuing to demand payment of moneys payable under the agreement on the basis of its continuing in force.

I think it is not precisely like the case of a mortgagee under a mortgage, whether conveying or not conveying the legal estate, pursuing all his remedies concurrently. If the plaintiff accepts merely an order for personal payment, he may have his costs of an action as against Ewing, the original

purchaser, alone. The defendant Moore would not have been a proper party to an action claiming that remedy only, but, being a party, he may apply subsequently and from time to time for such relief as he may appear to be entitled to, either against his co-defendant or the plaintiff or both. If the plaintiff prefers to abandon his claim for a personal order, he may have the usual order for sale and possession of the land, in default of the moneys owing on the agreement being paid within a time to be limited by the order, which I will fix at 3 months from its issue. The order in either form will reserve to the defendant Moore liberty to apply.

ALBERTA.

STUART, J. FEBRUARY 8TH, 1908.

TRIAL.

CLINTON v. SELLARS.

Husband and Wife—Judgment against Husband—Property Standing in Name of Wife—Fraudulent Scheme to Defraud Husband's Creditors—Allegation that Wife a Trustee for Husband—Parties—Judgment Debtor—Evidence—Gift—Mortgage—Burden of Proof—Pleading Profits of Business—Earnings of Wife—Principal and Agent—Undisclosed Principal—Action against Agent—Estoppel—Admission of Evidence—Depositions on Examination of Judgment Debtor—Costs.

In this action the plaintiff, a real estate agent, who on 31st October, 1906, obtained a default judgment for $420 and $37.31 costs against one George Sellars, the husband of the present defendant, in respect of a commission earned by him, the plaintiff, in connection with the sale of a certain hotel business and property in the village of Ponoka, sought to realize the amount of that judgment out of a mortgage taken in the name of the present defendant as security for the balance of the purchase price upon the sale. The hotel business was carried on in the name of the husband, and the license stood in his name: but the plaintiff alleged that, before engaging in the said business, the husband and wife

entered into a fraudulent scheme and conspiracy to defraud the husband's creditors, and that in pursuance of this scheme the hotel property—that is, the real estate—was registered in the name of the wife, the present defendant, and that, when the property was sold, the mortgage was taken in her name. There was an alternative allegation that, if the said business was carried on by the defendant, it was not carried on by her separately from her husband, within the meaning of sec. 36 of the North-West Territories Act, and that, therefore, the original investment, profits, and earnings, as well as the mortgage now representing a portion of the same, were in reality the property of the husband, and not of the defendant as against the plaintiff. The plaintiff asked for a declaration that the mortgage was the property of George Sellars, and not of the defendant, as against the plaintiff, an inquiry as to what property of George Sellars was vested in the defendant, and a declaration that all such property was held by the defendant as trustee for George Sellars, the judgment debtor, and was chargeable with the payment of the judgment, also an injunction restraining the defendant from dealing with the mortgage, and an injunction against one Henry Renfeldt, one Andrew P. Sorenson, the mortgagors, and one George Lamberts, the present registered owner of the hotel property, none of whom were parties to this action, restraining them from making any payments in respect of the mortgage to the defendant, and an order compelling them to pay the amounts due thereon into Court.

C. P. Grant, for plaintiff.

C. C. McCaul, K.C., and O'Brien, for defendant.

STUART, J.:—An interim injunction was granted ex parte in the terms asked for in the statement of claim, but, on application to Mr. Justice Harvey, this was varied by an order dissolving the injunction, on condition that $700 of the mortgage money be paid into Court. This, however, has not been done, and the original injunction still stands. On the hearing of the application to dissolve the injunction objection was taken by counsel for the defendant that Renfeldt, Sorenson, and Lamberts were not parties to the suit, and that therefore no injunction should be issued against them. This objection was overruled by my brother Harvey for the reasons given in his judgment: 6 W. L. R. 788.

At the opening of the trial counsel for the defendaant renewed this objection as to parties, and also added the further objection that George Sellars, the judgment debtor, should have been a party to such an action as this. I was very much impressed with this view, and therefore, without deciding the point absolutely, I offered the plaintiff the option of at least adding George Sellars, on the condition that the trial should be postponed, and that he should pay the costs of the day or of going on at his own risk. The plaintiff's counsel insisted on proceeding with the action as it was constituted, which was accordingly done.

I have considered very carefully the question of parties, and I have found nothing that would necessarily lead me to a different opinion from that expressed by me at the trial: but, in view of the decision I have reached upon the merits, it does not appear to me to be necessary for me now to express any final opinion upon the points involved.

There are possibly two views which may be taken as to the nature of this action; or rather it is possible, perhaps, to discover two grounds of action as being suggested in the statement of claim. First, we may view it as an action to set aside a fraudulent gift of property from George Sellars to his wife; and secondly, it may be perhaps contended that the plaintiff in his claim is alleging alternatively that there never was any real gift at all even as between the parties, but that the property was the property of the judgment debtor even as between him and his wife; that it stood in her name merely as a trustee for him; and that the relief prayed is a declaration that she is such a trustee.

With reference to the first ground, I am bound to say that I have found it rather difficult, though perhaps it is not impossible, to discover, even in the statement of claim itself, any allegations of fact which would constitute fraud. The rule is that there must be either a debt in existence at the date of the alleged fraudulent conveyance, or, if there is not, then there must be shewn a fraudulent scheme entered into for the direct purpose of defrauding creditors whose claims might afterwards arise. Now, there was no evidence at all that there was a single unpaid debt of George Sellars in existence prior to 2nd February, 1906, at which date I suppose the commission was earned for which judgment was obtained against him. This being so, the question is, was there any gift of property from George Sellars to the defendant subsequent to that date. I think that question must be answered in the

negative. The facts are that the property, at least one portion of the real estate, stood in the defendant's name on 22nd January, 1906, the date of one of the certificates of title; and as to another portion, it stood in her name as long ago as 12th October, 1903. Of course, the property was apparently only gradually paid for, and, no doubt, the proceeds of the business which the plaintiff alleges really belonged originally to George Sellars were from time to time applied in making payments on the property and in reducing incumbrances. These payments, it may be suggested, constituted gifts by George Sellars to his wife; but it does not appear that any such payment was made on or subsequent to 2nd February, 1906. It may be said, of course, that as to the chattel property in the hotel this was never registered at any time in the wife's name; but it was not shewn that the husband made any gift of this to his wife subsequent to 2nd February, 1906. It may be suggested, too, that the taking of the mortgage from the purchasers in the wife's name constituted a gift from the husband to the wife; but I do not see how this contention could be supported. As to the real estate, the property already stood in her name, and it was surely a natural thing to do to take the mortgage therefor in her name as well. It simply amounted to a change in the form of the property from real estate to personalty, or from real estate to a charge upon real estate. That certainly could not of itself constitute a gift from the husband to the wife. As to the chattel property in the hotel, which was no doubt included in the sale for $14,000, I cannot see, in respect to this either, that the taking of the mortgage in the wife's name for the balance of the total purchase money constituted a gift of that chattel property or of the preceeds of it by the husband to the wife. It appears that $2,000 was paid in cash, and a bill of sale of the chattel property was put in evidence, which shews a consideration of $2,000. For all that appears in the evidence, George Sellars may have got that $2,000 in cash and put it in his pocket and may have it still. The burden of proving a gift was upon the plaintiff, and I do not think he has adduced any evidence to shew that there was a gift of this chattel property or of the proceeds of it from the husband to the wife subsequent to 2nd February, 1906. It is true also that the liquor license stood in the name of George Sellars, and this, I have no doubt, was transferred by him to the purchasers subsequent to 2nd February, 1906. This license was to go with the property, and was covered by the total purchase

price. It would have yet a few months to run after 17th March, 1906, the date of the mortgage. In itself it is not an asset available to a creditor under a writ of execution. Considered by itself and as dissociated from the property, and in view of the short term it had yet to run, and of the possibility of the purchasers securing a license independently for themselves, I do not see that any particular tangible value can be placed upon it; at any rate, no attempt was made to prove that it possessed a pecuniary value or what the amount of that value would be. Even upon a reference, if one were made, to inquire as to its value, it seems to me the evidence would necessarily be so much a pure matter of guess-work and opinion that it is impossible for me now to consider any portion of the purchase price or of the mortgage security as being referable to it. I think it quite unlikely that the parties ever entertained any thought of placing any separate value upon it.

It seems to me it was incumbent upon the plaintiff to shew with respect to both the chattel property and the license that the value of these was included in the mortgage. If he had shewn this clearly, and had also shewn clearly the necessary preliminary fact that as to the chattel property this was the property of George Sellars up to the date of the mortgage, he might possibly have made out a case in this direction. The existence of even one debt unpaid is no doubt sufficient, if it is shewn that the debtor gave away all his property subsequent to the incurring of the debt, and before it was paid; but, for the reasons I have given, I do not think the plaintiff has made out his case on this ground.

Nor do I think it possible for me to find as a fact the existence of a fraudulent scheme or conspiracy entered into by the husband and wife for the purpose of defeating creditors whose debts might subsequently arise. It is only upon this ground, if at all, that the plaintiff's statement of claim can be said not to be demurrable. It certainly presents a peculiar state of facts as fraudulent. Paragraph 4 of the claim is particularly a strange one. In such a case as this we usually find it alleged that the wife has been carrying on business in her own name with the connivance of the husband; but in this paragraph, oddly enough, it is alleged that the business was carried on in the husband's name, and that it was his business. So far there would, I should hope, be nothing fraudulent. Otherwise, most business men are fraudulent, for that is just exactly what they do. Of course,

it is stated that "the defendant had the property registered in her own name." But I have certainly yet to learn that it is fraudulent for a hotel-keeper to carry on a licensed hotel business without having the property registered in his name; otherwise, every hotel-keeper who rents his premises would be fraudulent. If it is fraudulent for a wife to own the property in which her husband carries on business in his own name, or if such a condition of affairs is to suggest a fraudulent scheme or conspiracy, then I must revise my opinions as to what a wife and husband may properly do. And what other facts are there besides this to indicate a fraudulent purpose? It is said that the husband carried on a hotel business in his own name for a number of years. It is not shewn that he ever failed to pay a single honest debt during that time, or that there is a single business creditor who is sorry on his account; and yet we are asked to believe that the fact that as far back as 1903 part of the property, whose ever it was, was registered in the name of the wife, indicated the existence of a fraudulent scheme to defeat future creditors, and that too when the only creditor who ever turns up is a man whose claim is for a commission on the sale of the property. That is surely not a debt which the parties can be held to have been looking forward to so many years ahead and to have entered into a scheme to avoid. Where such a scheme is entered into, the debts anticipated must surely be debts which will probably arise out of the conduct of the business itself, and not one which arises after all business debts have been paid, when the parties are going out of business, and only incidentally in connection with the sale of the property. In the absence of a single other circumstance which would suggest the existence of a fraudulent scheme, it seems to me impossible for me to find on these facts that any such scheme was ever thought of by the defendant or her husband. So far, therefore, as this may be considered an action to set aside a fraudulent conveyance, I think the plaintiff must fail.

But Mr. Grant suggested that proof of the existence of fraud was not necessary to sustain the ground of action set forth in paragraph 9. Leaving aside the circumstance that this paragraph is not intelligible except when read in connection with prior paragraphs which do allege fraud, I have very grave doubt whether it is open to the plaintiff to take that position, even with regard to this paragraph itself. What can be the meaning of the words "as against the plaintiff" except this, that the plaintiff is a person defrauded in

some way? If the plaintiff meant to allege that the property mentioned is the property of George Sellars, and not the property of the defendant, even as between themselves, and that the defendant was barely his trustee, I think he should have said so. I think I shall be granting the plaintiff an indulgence to which he is scarcely entitled if I treat this paragraph as equivalent to such an allegation, and treat the action as alternatively an action to declare the defendant a trustee for George Sellars, the judgment debtor, of certain property as between themselves. Then the question of parties arises again in this connection, and I think the same difficulty appears as before. I have been unable to find any direct authority on the point, but in all the cases that I have been able to find where such a declaration was asked for, the alleged cestui que trust was made a party, and I am of opinion that he is a necessary party in such a case. However, upon the merits and upon the evidence, I think the plaintiff cannot succeed on this ground any more than upon the other. I think the plaintiff was probably right in his contention that, in the circumstances of this case, which I need not refer to particularly now, the business should be considered to have been the business of the husband, and that the wife is not entitled to the benefit of the provisions of sec. 36 of the North-West Territories Act. But how does that help the plaintiff here? The property is now held by the wife in her own name and in a form in which by statute she is entitled to hold it. Supposing the earnings should be considered to have been in the first instance the husband's, what did he do with them? They were used in paying off incumbrances upon property of which the wife was originally the registered owner, or which was bought in her name subsequently. I am not disposed to pursue an inquiry into the long and uncertain past in order to endeavour to discover the exact legal relations which existed between the husband and wife in Ontario some 15 years ago, which would have to be decided in any case upon the Ontario law, as to which no evidence was given. The defendant swears she brought certain money in her own possession up to Alberta from Ontario, and she swears that it was hers. I do not propose to go behind that evidence in this case. This money was invested in Ponoka in the property in question. The title was taken in her own name. Incumbrances were paid off by means of the proceeds of the business. The wife swears that this was done by the husband's consent and with his knowledge. Assuming that the

earnings of the business were his, in the first place. I think this constituted a gift from the husband to the wife, or perhaps a number of repeated gifts from time to time. At least I take it to have been prima facie a gift; and, if the plaintiff desired to establish the fact that, even as between the husband and wife, they never intended that these earnings should become the wife's through the medium of such an application of them, I think he should have shewn affirmatively that such was not the case. But he has made no attempt to do so, and I think the gift, or these gifts, must stand, in the absence of fraud, which I have held has not been proven. In the absence of fraud, the husband had just as much right to make these gifts to his wife as he would have had to make advances to a number of sons, for instance, who might be beginning business or farming in the neighbourhood. The Court may, perhaps, be readier to suspect fraud where a husband and wife are concerned, but it is certainly not fraudulent in itself for a man to have a wife and to make her presents of money if he wants to do so, and here nothing else was shewn.

Neither do I think that I should assume, because the wife's contention is that the earnings were hers at all times, that there never was any gift to the wife of these earnings or the proceeds of them. Upon the evidence it is plain that the parties clearly understood as between themselves that the earnings and proceeds were the wife's. The husband acquiesced in their being applied in payment for the property registered in her name. They may have been mistaken as to their legal relationship under sec. 35 of the North-West Territories Act, but there was surely no mistake as to which of them should be the legal owner of the property in its final form.

One point of view I may have overlooked. If the plaintiff had got judgment against George Sellars after 2nd February, and before 16th March, and had at once seized the chattel property in the hotel, what would have been the situation? Leaving the purchasers out of view for the moment, the wife would have claimed it. She would probably have been made the plaintiff in an interpleader suit, and possibly the burden of proof would have been put upon her. But I think she is in a more favourable position now. Assuming that the earnings of that business were the husband's, there is no direct evidence whatever to shew that any of those earnings went into the chattel property. There is no evidence

upon which I can really come to any definite conclusion at all as to how it was paid for. In this action, in which wholesale charges of fraud are made, I think the burden of proof should be thrown upon the plaintiff to shew that the chattels, at least, were at one time the property of the husband as between the parties themselves, and that, having once been his, there was a gift of them from him to her subsequently to 2nd February, 1906. The plaintiff, I think, has proven neither the one thing nor the other.

This, no doubt, is a hard case upon the plaintiff, but I am not sure that he has resorted to his only remedy. He sued a person for debt, and that person now turns out to be worthless. He also appears to have been the agent of an undisclosed principal, whose existence, I infer from what was said, was not discovered until after the judgment. Without giving a considered opinion, it would strike me that in such circumstances there was really no such election to sue the agent at all as would estop the creditor from also proceeding against the undisclosed principal. It looks to me very much as if the plaintiff had misconceived his remedy entirely; but, whether he has any other remedy or not, I must conclude that he cannot succeed in the present action on any ground, and it will therefore be dismissed.

I excluded the evidence of George Sellars taken in the other suit upon his examination as a judgment debtor. It is an ancient principle, which lies at the very basis of the common law of evidence, that no evidence shall be admitted against a party which has been taken in his absence and when he had no opportunity to cross-examine the witness. One or two of the questions put to the defendant in her examination for discovery, which was put in, shew apparently that she disagreed with some things that her husband had said. A statute which would deprive a defendant in such a case of the right to cross-examine a witness whose evidence is being tendered against him must, in my opinion, be extremely clear and explicit, and must avowedly say that the old rule to which I have referred must be disregarded in this particular case. If the legislature intended by Rule 380 (3) to make such a change, I think it should have said so explicitly, which I think it has not done.

No precedent was cited in support of the ground of action set forth in paragraph 9 (b), and I do not think that such an action is maintainable.

As to the question of costs, I do not think the defendant has been injured very much either in her feelings or her reputation by the allegations of fraud. I think the offer of settlement which was made in the letter of 11th December might very well have been made at an earlier stage, before large costs were incurred, and, for that reason, I have decided that there will be no costs up to the trial; but I think the plaintiff should have accepted the offer, even when it was finally made, as being the best settlement that he could reasonably expect to get in the circumstances, and the defendant will, therefore, have her costs against the plaintiff incurred subsequent to the receipt of the letter in question.

ALBERTA.

SCOTT, J. FEBRUARY 8TH, 1908.

SINGLE COURT.

FOWLER v. BARNARD.

RE BARNARD.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors—Agreement of Creditor to Postpone Claim in Order that Business of Insolvent Might be Carried on—Construction of Agreement—Right of Creditor to Rank with Others in Distribution of Assets—Receiver.

Application by Adelaide Manley, a creditor of the defendant Alfred H. Barnard, an insolvent, to compel the receiver of the insolvent estate of defendant Barnard to pay the applicant a dividend upon her claim against the estate proportionately to that already paid by him to the other creditors, and for a declaration that she was entitled to share in the estate to the same extent as the other creditors.

J. C. F. Bown, K.C., for the applicant.

C. F. Newell, for the assignee.

SCOTT, J.:—The insolvent was a merchant carrying on a general store at Rosenroll. On 17th June, 1905, being then in insolvent circumstances, he assigned to defendant Roper for the benefit of his creditors. The applicant duly filed with the assignee the particulars of her claim, which

amounted to $6,733. After her claim was filed, she appears to have carried on negotiations with the assignee and some of the other creditors, and, apparently as the result thereof, she on 27th August, 1905, wrote the assignee the following letter:—

"To the assignee or receiver Barnard's estate:

"Please withhold my claim against the above estate for the period of 12 months from this date, or until such shorter period as the payment of the trade claims against the estate to be made in full, at the end of which period you for yourself and the creditors in the said estate agree to transfer and assign to me or to my nominee the business, stock in trade, book debts, or any other assets of the estate which may be in your possession. If any extension of the period of 12 be necessary to pay the trade creditors in full, then I am to have the option of extending this agreement, or ranking with the other creditors as I may see fit."

This letter was read at the meeting of the creditors of the insolvent held on the same day, at which meeting the following resolution was passed: "That this meeting recommend the assignee to accept the offer of Miss Manley withdrawing her claim on the conditions named in the offer, and at the end of this arrangement the stock in trade to be not less than when taken over by the receiver."

By an order made in the above suit of Fowler v. Barnard, on 20th November, 1905, defendant Roper, the assignee, was discharged from the trusts under the assignment, and John F. Fowler, one of the plaintiffs, was appointed receiver of the insolvent's estate, and was appointed to carry on the business until further order. The order further directed that, after retaining such sums as might be sufficient to carry on the business, he should apply the remainder in payment: first, of the costs of the action; second, the costs and expenses of winding up the estates; third, of all claims for wages in full; and fourth, of the other liabilities of the insolvent payable out of the estate ratably and proportionately without preference or priority.

This order appears also to have resulted from the negotiations between the applicant and the other creditors, at the meeting referred to. It seems that the other creditors represented at the meeting thought that, if the insolvent's business was carried on for a year, the profits therefrom would be sufficient to pay in full the claims of all the creditors other than the applicant. The action of Fowler v. Barnard ap-

pears to have been a friendly one, instituted mainly for the purpose of enabling this course to be pursued. The receiver carried on the business under the order for a year or more, during which period he paid the creditors, other than the applicant, a dividend of 25 per cent. upon their claims. It appears to have been found that the carrying on of the business would not result in the payment of the creditors in full, and the receiver therefore determined to wind it up, which he did by selling out the stock in trade, the proceeds of which he now holds for distribution. The applicant thereupon gave the receiver notice of her intention to rank with the other creditors. He is willing to allow her to do so with respect to the proceeds of the sale now in his hands, but he refuses to pay or allow her the dividend of 25 per cent. already paid to the other creditors, and has notified her of his intention to distribute the sale proceeds pro rata among all the creditors.

The affidavits filed upon this application are contradictory as to what was intended by the agreement resulting from the applicant's letter of 20th August, 1905, and the acceptance of its terms by the resolution passed by the creditors' meeting, but, as that letter and resolution constitute an agreement in writing, resort should be had only to those writings in order to ascertain its effect.

In my opinion, the applicant is entitled under that agreement to rank pro rata with the other creditors, not only in respect of the proceeds of the sale, but also with respect to that portion realized by the receiver while carrying on that business. There is nothing in the agreement to lead to the view that she abandoned her right to rank on any portion of the estate. She merely undertook to stand aside for a year in order that the other creditors might have an opportunity to realize their claims out of the business. She expressly reserved her right to elect to rank as a creditor after the expiration of the year, and a right to rank as such must be held to be a right to rank upon the whole estate and not merely upon only such portion of it as might remain in the receiver's hands at the end of the year.

I have shewn that the order of 20th November, 1905, directs that, after payment of certain prior charges, the remainder of the estate shall be applied in payment of the liabilities of the insolvent ratably and proportionately and without preference or priority. The applicant's claim is recognized by the receiver as a liability of the insolvent, and the

effect of the order is, that she is entitled to share equally with the other creditors in any distribution made by the receiver. That, however, would not prevent the carrying out of the agreement. In my view, the course the receiver should have pursued was, when striking a dividend, to include the applicant's claim with the other liabilities, but to retain her share of it until such time as it could be ascertained whether the other creditors' claims would be realized from the profits of the business.

It was contended by counsel for the receiver that, if the applicant received a dividend not only from the sale of the stock which had been kept up in the meantime, but also from the profits from the business, she would receive more than she would have received if the stock had been sold in the first instance.

I cannot see that, even if such were the case, it would affect the agreement. There is nothing to shew, however, that any profits were realized. It is shewn that, when the receiver took over the estate from the assignee, he received from the latter a considerable sum of money realized from the collection of book debts and other sources, and the dividend must have been at least partly paid with these moneys. Surely the applicant would be entitled at least to share in these moneys.

The applicant is entitled to an order that the receiver pay to her a dividend upon her claim filed, proportionate to that already paid by him to the other creditors, and a direction that she is entitled to share in like proportion in the whole estate of the insolvent.

The applicant to have the costs of the application, payable out of the moneys of the estate in the receiver's hands.

ALBERTA.

SCOTT, J. FEBRUARY 13TH, 1908.

TRIAL.

WATTS & CO. v. MOHLER.

Contract—Breach—Delivery of Lumber—Orders for Lumber—Acceptance — Correspondence—Evidence—Failure to Deliver Part—Damages.

Action for the price of lumber sold and delivered by plaintiffs to defendant and for freight prepaid thereon.

Counterclaim for damages for the breach by plaintiffs of agreements for the delivery of more lumber.

C. C. McCaul, K.C., for plaintiffs.

O. M. Biggar, for defendant.

SCOTT, J.:—plaintiffs, who are lumber manufacturers carrying on business at Wattsburg, British Columbia, claim from the defendant, who is a lumber dealer at Ohaton, Alberta, $446.25, being the price of two car-loads of lumber sold and delivered to the defendant, and $222.96 for freight prepaid thereon, making a total claim of $669.21.

At the trial plaintiffs' counsel applied to amend by increasing the amount claimed to $685.10, and, as no objection was taken to it, I allowed the amendment. Defendant having admitted the latter amount to be due, I give judgment for the plaintiffs therefor with costs.

Defendant counterclaims for damages for the breach by plaintiffs of an agreement alleged to have been entered into by them on 6th September, 1905, whereby they agreed to sell and deliver to the defendant 12 car-loads of lumber at the rate of $15.50 per thousand feet, said lumber to be shipped by plaintiffs when advised by the defendant on or before 1st April, 1906. Defendant alleges that the plaintiffs shipped to him 5 car-loads under the agreement, but that, although defendant at various times before 1st April, 1906, advised and requested them to ship the remaining 7 cars, they did not deliver them.

Defendant also counterclaims for damages for breaches of other agreements on the part of the plaintiffs to deliver other two car-loads, but the latter counterclaim was abandoned at the trial.

On 6th September, 1905, the plaintiffs' traveller received from the defendant at Wetaskiwin the following order:—

"Wetaskiwin, 6th Sept., 1905.

"Order No. 50.

"Watts & Co. Wattsburg, B.C.

"Ship to James W. Mohler at Wetaskiwin, when advised, terms 60 days, 12 cars, board dimension and shiplap at $15.50. Dimension 2 x 4 to 2 x 10.10 to 16 4 x 4 to 6 x 6 same prices. Good to the 1st of April, 1906."

Apart from the acceptance of this order by plaintiffs' traveller, and any question that may arise as to the effect thereof, the acceptance thereof by the plaintiffs is, to my

headed "Dawson, June 27th, 1901. Bills, notes, and other securities lodged in connection with the account of Joseph Barrette, customer of the Canadian Bank of Commerce." Then there is a schedule, giving the date—"1901, June 22nd, No. 1, Syndicat Lyonnais du Klondike, amount $92,-500;" and below is written the following: "The above mentioned securities and any renewals thereof and substitutions therefor and proceeds thereof are to be held by the Canadian Bank of Commerce as a general and continuing collateral security for payment of the present and future indebtedness and liability of the above-named customer and any ultimate unpaid balance thereof, and the same may be realized by the bank in such a manner as may seem to it advisable, and without notice to the undersigned; in the event of any default in such payment, the said proceeds may be held in lieu of what is realized, and may, as and when the bank thinks fit, be appropriated on account of said Barrette's interest indebtedness and liability, as to the bank seems best. The undersigned agree that the bank may grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, without prejudice to the liability of the undersigned. The claims of the undersigned against any party on whom any of the foregoing unaccepted bills are drawn are hereby assigned to the bank in the event of non-acceptance. Joseph Barrette." This note was not paid by the syndicat, and on 16th May, 1902, the Bank of Commerce instituted an action against the syndicat and Barrette, suing upon the note, which was indorsed to the bank. In that action the syndicat counterclaimed against the bank and the defendant Barrette, setting up fraud and deceit on the part of the bank and Barrette in negotiating a sale of the property. Besides setting up in this counterclaim fraud and deceit, the defendant syndicat raised against the note and mortgage a great body of defences of a technical character—want of seal, want of authority on the part of the agent who had signed the note on behalf of the syndicat, and several other technical and legal defences. The action came on for trial before me on 9th September, 1902, Mr. O. H. Clark, who was solicitor for the Bank of Commerce, being counsel for the plaintiffs, Mr. Stacpoole, now counsel in this action, assisting Mr.

Clark in the original action. Mr. Bleecker, the present counsel in this action for the syndicat, appeared for the syndicat. Up to and until 12th September no one appeared for Mr. Barrette, although he was in Court and summoned as a witness. It appears now, as will be seen by the judgment (6 W. L. R. 424) which I gave setting aside the judgment against Barrette, that Barrette had never appeared in the main action on the note at all. He says that his recollection is that he was never served. Mr. Stacpoole upon that motion swore he was served. These affidavits are on file. But the solicitors for the bank never entered judgment by default against Barrette for non-appearance. By the evidence in this case, and by the affidavits which were used and which appear as exhibits, it is clear that very confidential relations existed between Barrette and the bank at that time; that Mr. O. H. Clark advised Barrette that there was no need for him to employ separate counsel to defend his interests, as the bank and he were in the one interest so far as answering the defence and counterclaim of the syndicat were concerned. But about 12th September Mr. Clark advised Barrette that he ought to have counsel to look after his own interests. Thereupon he engaged Mr. Pattullo, one of the present counsel in this action, to appear for him at the trial. Pattullo appeared, and then it was seen that Barrette had not been served with any counterclaim at all. I expressed my intention of striking out the counterclaim wholly as against Barrette and dismissing it as against him for irregularity. After some argument at that trial as to the effect of Barrette continuing in the case, the matter stood over, Mr. Pattullo being allowed to watch the case for Barrette, and on 18th September I find the following in my notes—and these notes appear as an exhibit at this trial: "Mr. Pattullo, counsel for Mr. Barrette, appears and asks, as the defendant Barrette has been made a party defendant by counterclaim with his co-defendants, that he appear and be allowed to file a full defence to the said counterclaim, as it affects the said defendant Barrette, and waives want of service or irregularity of service and all formal defects in proceeding, and consents that his client Barrette is now properly before the Court by procedure." Fuller notes of what occurred at the time appear in the reporter's notes, which are part of the exhibits in this action. The trial thereupon went on. Mr. Pattullo, for Barrette, cross-examined witnesses on his behalf. My judg-

ment given at that time was against the syndicat only on the note and mortgages, not against Barrette, and against Barrette on the counterclaim for damages for $40,500. After the delivery of that judgment, a motion was made for a supplementary judgment, and a request that I should direct that an account be taken as between Barrette and the bank as to what was due on Barrette's debt, and that the note and mortgages being only assigned to the bank as collateral security, a certain balance would then be coming to the defendant Barrette, because the manager of the bank had sworn on the trial that Barrette's debt only amounted to $67,000. There would then, on an accounting, speaking roughly, be a balance of over $20,000 coming to Barrette on the note assigned as collateral, which balance the syndicat asked to have applied, pro tanto, on their judgment for damages. This I granted by a supplementary judgment dated 2nd March, 1903, in which I directed a reference to ascertain the amount due by Barrette to the bank, and that the order of reference be taken out within 10 days. Following this the solicitors for the bank prepared minutes of judgment, which were approved by Mr. Pattullo, but when signing judgment these minutes which had been approved were destroyed, and new minutes prepared by the solicitors for the bank, and used upon the signing of the judgment without any reference to Mr. Pattullo, Barrette's solicitor. In the meantime and without notice to Mr. Pattullo, the solicitors for the bank obtained from me a postscript to my judgment worded as follows: "There will be judgment for the plaintiffs the bank against Barrette, he not defending against them, for the amount claimed in the writ." The amount claimed in the writ was $92,500 and interest thereon at the rate of 6 per cent. from 26th June, 1901. This note of mine is not dated, and it appears to have been very hurriedly written after my supplementary judgment. Why I made that note, upon what material or representations, I do not now remember. If any affidavits were used, they are lost; and Mr. Stacpoole, who was examined upon his affidavit upon these words, cannot remember either, he admitting that he was the one who made the application. Certainly something must have been represented to me or I would not have made that note. I was probably misled by the fact that Barrette had not defended, and that he was represented at the trial, and was led to conclude that judgment by default should go against him, his signature

being proved. Looking at it now, it is quite clear that it is wholly inconsistent with the original judgment and with the evidence given at the trial and with the supplementary judgment which directed a reference to ascertain the balance coming from the bank to Barrette upon that judgment against the syndicat. It is true that Barrette appeared upon the trial without formally appearing in the action in a regular way, and that he gave evidence, but it is equally true that there was no trial of the bank's claim against him nor of the claim for the balance due by him. At the time of the trial it was not shewn that Barrette had not appeared in the main action, the plaintiff evidently relying on his non-appearance to sign judgment by default. He was certainly liable as indorser for that note, and judgment might have been obtained against him in default of appearance; but that was not done. That judgment I set aside on 15th June, 1907, and the reasons why will appear in the judgment, which is filed as an exhibit in this action. The formal judgment in that case was entered on 4th March, 1903. The syndicat did not take out the order of reference to ascertain the balance, and nothing was done upon that part of the judgment. For a fuller account of the proceedings upon the motion to set aside that judgment I refer to the reasons for judgment which appear as an exhibit in this action. By a perusal of that it will appear that a motion was first made before Mr. Justice Dugas to set aside that judgment, and held over by him until it could be heard by me, and for various reasons, which will later appear, it stood over until 15th June, 1907.

Barrette appealed from my judgment to the Court en banc in April, 1903, and that appeal was heard in the month of April, 1904, and judgment given on 16th June, 1904, allowing the appeal and reversing my judgment, that is, so far as it allowed damages to the syndicat against Barrette.

About 6th May a settlement was made between the syndicat and the bank. The settlement negotiations were opened up by a letter of 30th April, 1903, from the solicitors for the syndicat to the solicitors for the bank. This letter was tendered in evidence by the bank but not admitted. What is evidence of the settlement is embodied in an order dated 6th May, 1903, which is filed as exhibit H, and reads as follows: "Upon the application of the plaintiffs and the defendant corporation herein, and upon the

parties appearing by their counsel, Mr. Clark appearing on behalf of the Canadian Bank of Commerce, and Mr. Bleecker appearing on behalf of the Syndicat Lyonnais du Klondike, it is ordered, adjudged, and decreed that the moneys now in this Court as security for a stay of execution herein be disposed of as follows: (1) that out of said moneys the plaintiffs be paid the sum of $76,877 in full of all their claim, debt, interest, and costs against the Syndicat Lyonnais du Klondike in this suit; (2) that the sum of $1,123 be paid to the firm of Clark, Wilson, & Stacpoole in full of their costs against the said Syndicat Lyonnais du Klondike, which, with the sum of $2,500 already paid, is payment in full of all their costs against the said the Syndicat Lyonnais du Klondike in this suit; (3) that the balance of said moneys, being the sum of $9,156.62, be paid out to Messieurs Bleecker & DeJournel, solicitors for the defendants the Syndicat Lyonnais du Klondike, said payment being intended as a release and settlement in full from all and any claims for moneys or costs whatsoever between the Canadian Bank of Commerce and the Syndicat Lyonnais du Klondike in this action, or by counterclaim, and a judgment on all matters of difference between them to this date. It is further ordered that the plaintiffs' suit against the defendant corporation the Syndicat Lyonnais du Klondike be and the same is hereby dismissed without costs and the counterclaim of the Syndicat Lyonnais du Klondike against the plaintiffs be and the same is hereby dismissed without costs. And it is further ordered that neither this order nor the settlement between the Canadian Bank of Commerce and the Syndicate Lyonnais du Klondike made this day shall in any way affect the rights or remedies, if any, which the above named defendant by counterclaim, Joseph Barrette, may have against the above named defendants the Syndicat Lyonnais du Klondike, or that the Syndicat Lyonnais du Klondike may have against the said defendant Joseph Barrette, nor shall this order affect any rights which either the said Joseph Barrette or the said the Syndicat Lyonnais du Klondike may have to appeal the judgment now standing against the said Joseph Barrette in this cause, or any rights which either of them may have under the judgment now signed against the Syndicat Lyonnais du Klondike." Attached to the order is a consent by Clark, Wilson, & Stacpoole, solicitors for the Bank of Commerce, and by Bleecker & DeJournel, solicitors for the Syndicat Lyonnais du Klondike, and the order was taken out by the syndicat's solicitors.

This settlement was negotiated and the order taken out without any reference whatever to Barrette or his solicitors. What the bank's contention in the matter is will appear later on; but at the time when the motion was made to set aside the judgment against Barrette, they contended and still contend that Barrette had no solicitor appearing for him in the main action, only on the counterclaim, and that this order of settlement has not affected Barrette's rights in any way, and particularly has not affected his rights on the counterclaim. It is useless to say that at the time this settlement was negotiated the syndicat was fully aware of Barrette's contention, that the bank held their note as collateral only. They were present in Court and heard the evidence given by the manager of the bank that the debt of Barrette to the bank was very much less than the amount of the collateral security held by the bank, which was their note. I will refer later on to the attitude of the bank in regard to Barrette, and their contention in this action, and the evidence of their manager upon that point. But in the history of the case it is in order now to refer to the fact that on 6th May Pattullo & Ridley, Barrette's solicitors, hearing of a settlement, wrote to the bank as follows: "We understand that a settlement is being made in this action between the bank and the syndicat. We do not know the terms of the settlement, nor in what way it may affect the position of the defendant Barrette with respect to the bank. We have just heard of the settlement, and our client, as you are aware, resides on Gold Run, and cannot be communicated with under 3 or 4 days. We beg to notify you, as solicitors for the Bank of Commerce, on behalf of our client, the defendant Barrette, that he will hold the bank responsible for anything done by it prejudicial to his interests." Promptly on the reversal of my judgment by the Court en banc here, Barrette's solicitors wrote to the bank asking for an account, alleging his liability at about $65,000 or $70,000, not being able to ascertain the exact amount, and alleging trusteeship in the bank for Barrette to the extent of the difference between the amount of the judgment recovered and the indebtedness, asking if the bank had recovered the full amount of the judgment against the syndicat, and for an account. On 21st June the bank, in answer to this letter, wrote to Pattullo & Ridley saying, referring to the last letter, that they "have already furnished Barrette with a pass-book,

and do not feel called upon, especially at this busy season, to occupy time which we cannot very well spare, for the purpose of supplying a second statement. As regards the securities which were assigned to us by Mr. Barrette, it appears to us that he ought to be in equally as good a position as ourselves to give the full particulars of them, and as regards the last question in your letter in connection with the amount of judgment recovered, we would refer you to our solicitors, who are in a better position than ourselves to furnish you with this information." Barrette's solicitors acknowledged this letter, saying: "The pass-book gives no details, no details with regard to interest," and asking for a full statement, further stating that "Barrette is at a loss to understand the position taken by the bank with regard to the security assigned by Barrette to the bank," and that Barrette has no information and has not been able to obtain any from the bank as to the bank's dealings with the securities, as to whether they have been fully realized upon against the syndicat or not, asking the bank to instruct their solicitors to notify Barrette's solicitors. In reply to this letter the bank say; "Referring to yours of the 24th ultimo, we see no reason to change the stand we took in our former letter to you in this matter of 21st June. We have already furnished Mr. Barrette with a pass-book similar to that furnished to our other customers, and, as we are not making any demands on him, we cannot see why we should be called upon for a second or special statement. It seems to us that it should be quite time enough for him or yourselves as solicitors to request a statement from us when we make such demand. With regard to the judgment recovered by the bank against the Syndicat Lyonnais du Klondike, we may say that our solicitors will be very pleased to give you the information asked for, should you care to call and see them in the matter." Voluminous correspondence took place here between Barrette's solicitors and the bank, Barrette's solicitors expressing surprise at the position taken by the bank, and the bank withholding all information in a very curt way. The purport of the correspondence on behalf of Barrette was that the bank should account for the surplus over Barrette's debt to the extent of the judgment obtained against the syndicat; that the bank should collect that judgment under execution or account for the securities which they held. To all these requests the bank and their solicitors gave no reply which can be called at all

satisfactory: in fact, the position taken by the bank seems to be one of holding Barrette off without any reason or excuse. Their solicitors also are most curt in their replies, and say, in regard to the securities which were taken from the syndicat, that they remain in exactly the same position as they were before the settlement was made. The solicitors for Barrette also wrote to the Syndicat Lyonnais, who refer them to their solicitors, who in their turn give no information. It seems to me that the position taken both by the solicitors and the bank is an extraordinary one, when we consider that a very large sum apparently was coming to Barrette from the judgment, putting it in round figures, upon the bank's own sworn statement, at something like $25,000—and an absolute refusal to give any information, any accounting, or any assistance to a man who had been their customer and client for so many years and in a matter which involved hundreds of thousands of dollars, where, as was well-known, Barrette trusted absolutely to the bank in the whole matter.

When the judgment given by myself was reversed by the Court en banc, the plaintiffs, the Bank of Commerce, were in a position then, upon the further appeal to the Supreme Court, either to press their execution for the full amount of the judgment, or to demand security. No stay was obtained; the matter went to the Supreme Court, who reversed the Court en banc in part, that is, to the extent of restoring my judgment against Barrette, but reducing the damages from $40,000 to $27,000. Thereupon Barrette appealed to the Privy Council, who reversed the Supreme Court and restored the judgment of the Court en banc in full. This judgment of the Privy Council was made a judgment of this Court on 7th May, 1907.

The action I am now trying was instituted on 20th October, 1904, and by mutual consent was not brought to trial owing to the pending appeals in the former action, and was brought to trial as soon as possible after the determination of the matter by the Privy Council. In this action the plaintiff asks that an account be taken to ascertain the amount due to the defendant bank by the plaintiff; that an account be taken of the amounts received by the bank on the collateral note and mortgages, and judgment against the syndicat; that it be declared that the indebtedness of Barrette to the bank is fully paid; and that an account be taken of the balance still unpaid on the note and judgment

against the syndicat; and that the bank account to Barrette for the surplus and be ordered to pay over the amount so to be ascertained; that the bank be restrained from further dealing with the note and mortgages and judgment, until the final order of this Court; that it may be declared that the bank, by their wrongful action in respect to their dealings with the securities, were guilty of a breach of trust, and, by neglect of their duty as trustees, are liable to the plaintiff for the loss sustained or occasioned to the plaintiff.

The bank have neither offered to account for the surplus nor have they offered to return the securities. It is difficult to make head or tail of the bank's pleadings, or to learn from the pleadings exactly what position the bank do take in the matter. At one time in the argument the bank assert their right to do what they did do, and sacrifice the securities of Barrette under their hypothecation agreement, already set out in full; at another time they allege that acting as trustees they acted in good faith and providently in the interests of Barrette. But on the pleadings the bank do not take either of these grounds squarely and fairly, and it cannot be learned, as I have already said, from the pleadings what position the bank are taking in the matter. They contend that the securities are not affected by the settlement and Barrette's rights not impaired, but they will not transfer these securities with the usual covenant that they have not by any act of their own affected or impaired Barrette's rights to recover on them. The evidence put in on this trial consists mainly of exhibits shewing the history of the former trial and the dealings with the securities between the bank and the syndicat, the course of the various appeals and judgments given, and the manner in which the bank treated Barrette and the syndicat. All that I have recited as to the history of the action will appear by the exhibits. That Barrette relied entirely upon the bank in all their dealings up to the time when he was told to employ counsel for himself during the progress of the first trial, is abundantly proved, and, even after that time and up to the time when the bank obtained what has been called a snap judgment against Barrette behind his back, he had no reason to think that the bank were acting in other than a friendly way towards him and preserving his interests. He had grounds for suspicion at the time of the settlement with the syndicat, and the conduct of the bank

then was the first indication which he had that they were acting in a manner which might be construed as hostile to his interests. The evidence of Mr. Stacpoole, given upon a motion to adjourn the hearing of a motion in this case, as well as the evidence of Mr. Bleecker, counsel for the syndicat, shews the confidential relationship and the trust which existed between Barrette and O. H. Clark, solicitor for the bank, which confirms Barrette's evidence given on this trial. Mr. Cameron was examined for discovery and was called for the defence in this case, and a great part of the examination for discovery was put in by the plaintiff as part of his case in this trial. That evidence for discovery discloses that Mr. H. T. Wills was the manager of the bank at the time when these securities were taken, and was in Dawson for a year and a half or two years after the trial of the first action; that Mr. Cameron came in as his successor in the management, and was here at the time of the giving of the judgment in the former action, and was fully aware of the contentions raised by all the parties on these issues; that Mr. Cameron was manager of the bank at the time of the settlement made with the syndicat; that at the time of the settlement with the syndicat Barrette was in the country carrying on business at a place called Gold Run, within about 50 miles of Dawson, to which there was a daily or tri-weekly mail and direct communication by telephone; that Mr. Barrette's solicitors were in Dawson, the same town, within two minutes' walk of the bank; that the bank knew that they were Barrette's solicitors; in fact, they received information on the very day of the settlement from the bank's solicitors that such a settlement had been made; but, up to the time the settlement was closed and the order taken out, the bank studiously excluded Barrette from all connection with the settlement, which was made entirely behind his back, although the manager admits on oath that he was well aware of the pending appeal by Barrette against my judgment, which had then been argued and was standing for judgment before the Court en banc. Mr. Cameron admits that he was aware of all this. He says he was thoroughly conversant with the bank's position; that the syndicat paid on the settlement $80,500, including costs, and was allowed to draw down out of the money in Court a sum of over $9,000, although at that time the bank had a judgment on the collateral security against the syndicat for over $101,000; and that Barrette's debt at that date was

about $75,000. He further admits that he knew Barrette was in the country; that he took no steps whatever to communicate with him prior to the settlement; that he knew that Pattullo was acting for him. He says: "I don't know that we ever considered communicating with Barrette at all; all we considered was the position of the bank with the syndicat." Further; "I was not settling Mr. Barrette's differences; we were simply settling our own interests." He said there was no settlement in writing beyond the order of the Court. . . .

From Mr. Cameron's evidence and from the correspondence it is quite clear that the bank did not consider at all their position as trustees for Barrette, but simply were trying to save themselves at the expense of Barrette, or at least without regard at all to Barrette's interests. Mr. Cameron says that the question of the syndicat's financial responsibility was never considered and never came up in the discussion between themselves and the solicitors or in any other way prior to the settlement. Mr. Cameron, in answer to a question why he did not give an account, said that under the Bank Act they were not allowed to reveal customers' accounts to anybody, even to the solicitor, and that is the excuse now made for refusing Pattullo & Ridley a proper accounting on their demand as Barrette's solicitors. But there is no indication on the correspondence given that this was the reason why the bank refused to give Barrette a proper accounting.

It is important to remember, in considering the law in this case, that Barrette was absolutely excluded from all participation in the settlement or knowledge of it; that he had no power whatever to indicate what his wishes were or to protect his own interests as between the syndicat and the bank. Further, it is also clear that the syndicat were also trying to save themselves as against Barrette. They were fully aware of Barrette's position; they were fully aware from the affidavits filed in the case, from the evidence given at the trial, that a large surplus was coming to Barrette, were it not for the counterclaim which the syndicat set up on the ground of Barrette's deceit. And it is also worthy of remark that this settlement was hurried on just prior to the judgment of the Court en banc, which reversed my judgment and placed Barrette in the position of one entitled to an accounting on his collateral security, and to recovery of the full amount which the syndicat owed him on

the debt created by the sale of his property to them. Evidence is further given of the financial responsibility of the syndicat at the time of this settlement and for long after, and the evidence is conclusive upon this point, that the financial responsibility of the syndicat was ample, and that up to the time of this trial this amount could have been recovered against them by execution. The bank do not pretend to answer the evidence upon this point, and there is no doubt about it. Barrette also gives evidence and speaks of his relationship with the former manager, Mr. Wills, who acted for the bank in all the negotiations regarding these documents, and speaks of his relationship with the bank's solicitor, and swears to what I have already recited of the history of the action.

On the question of interest which is raised in this issue, the bank have charged a greater amount than the legal rate fixed by the Bank Act, namely, 7 per cent.: in the early days of the dealings 2 per cent. per month, later on 1½ per cent. per month, and still later 1 per cent. per month. Barrette admits knowing that he was paying these various rates. He further says that, but for the action of the bank in regard to this security and the balance coming to him, he would never have raised the question of interest; that he was quite content to pay it. He admits that the cost of living, even to-day, in Dawson, is 4 times the cost on the outside, that is, on the coast or in the older provinces, and in the early days of Dawson the cost of living was considerably greater. He says that the bank had practically all his property as security for his indebtedness, and that, after the settlement made with the syndicat, Mr. Clark, solicitor for the bank, offered him various sums to settle and give the bank a release, at one time as high as $10,000. Mr. Cameron denies giving Mr. Clark any authority to make these offers. Some contention on the trial arose over the admissibility of evidence that the bank had submitted the case to their solicitors and obtained an opinion that it would be provident for the bank to settle as they proposed to do. I ruled that the bank might give evidence of a proper submission of the entire case to counsel as trustees for Barrette, and that the opinion of counsel would be evidence for them on the question of their trusteeship as to whether they had fairly and providently acted as trustees for Barrette; but, on a perusal of the correspondence, I could see no such proper submission nor any advice given by counsel upon a proper

submission of the case as it existed; in fact, the correspondence discloses that the local solicitors advised against a settlement, and that the bank, against the opinion of their local solicitors, went on with the settlement. So far as the trusteeship is concerned and the bank's conduct as trustees, I cannot find that the bank acted either fairly or providently as such trustees; in fact, as I have already said, the bank never considered properly the question of trusteeship, and considered entirely their own interests. As they say, "we were settling for ourselves," and they were leaving Barrette and the syndicat to fight it out, and the bank here never went into the question of how Barrette might recover on the balance of the judgment. Mr. Cameron does say, however, that he was advised not to hand over the securities to anybody until the final disposition of the action.

As to the law on this question, it is contended by the plaintiff's counsel, Mr. Congdon, in his argument, that there was a fiduciary relationship existing between the bank and Barrette; that that fiduciary relationship is evidenced by the dealings between Barrette and the bank, all the way through from the earliest times up to the time of this transaction; that the bank prepared all documents and papers which Barrette required in carrying on his business which at all related to any advances made by the bank to him. Without any hesitation Barrette assented to everything which the bank did, both in his own behalf and on their behalf. Upon this point there was cited to me the case of Lamoreux v. Moleur, Coutlée's Digest, 1904, p. 180.

Upon the question of the position of the holder of collateral security to account to the pledgor for the same, a great mass of authority has been cited to me, which I will consider shortly. Upon this point I would refer to Paget on Banking, p. 240: "If there be no defective title, he (the pledgee) recovers the whole amount of the bill from any party to the bill other than the one from whom he took it, holding the excess over the amount of the lien as trustee for or to the use of his debtor." And Maclaren on Banks and Banking, pp. 103 and 105: "Where timber limits given to a bank as collateral security were offered at auction and withdrawn and subsequently sold at a private sale for what was held to be a grossly inadequate price, the bank were held liable for the difference between the sum obtained and the real value of the limits:" Prentice v. Consolidated Bank,

13 A. R. 69. And again: "If it (the pledgee) realizes more than its debt from its collaterals of otherwise, it holds the surplus as a trustee for the customer, who is entitled to it, and also to the surrender of any collaterals on hand after payment of the debt." I would also refer to the case of Union Bank v. Elliot, 14 Man. L. R. 187, and Ryan v. McConnell, 18 O. R. 409; also Colebrooke on Collateral Securities, p. 174 et seq., where he lays it down as the duty of the pledgee to collect collateral notes; Williams v. Price, 2 L. J. Ch. O. S. 107, 1 S. & S. 582. The latter report emphasizes the point made in this case of the exclusion of the pledgor when dealing with the security; see p. 587 of the last report. The head-note of the case is: "Where a creditor takes from his debtor an assignment of a debt due from a third person as a security for his demand, and by his wilful default the debt becomes irrecoverable, he must bear the loss." The Vice-Chancellor in giving judgment said: "The question here is what is the degree of diligence which a creditor accepting from his debtor, by way of collateral security, the assignment of a judgment recovered by that debtor against a stranger, is bound to use for the purpose of enforcing satisfaction of that judgment. It is not necessary to determine whether such a creditor is bound, at all events, to use legal diligence to give effect to the judgment, or whether he may remain passive until required by the assignor to resort to legal diligence. Here the creditor, by suing out execution, assumed, as it were, the possession or control of this judgment in exclusion of the assignor, and is within the principle which charges the creditor in possession of property held by him as security, not only with what he actually receives, but what he might have received but for his wilful default or neglect." And upon the further question of the position of the pledgee and his good faith I would refer again to Colebrooke, pp. 181, 202, 206, 209, and 210. There Colebrooke lays it down that "the pledgee cannot compromise nor surrender collateral securities. A pledgee of negotiable securities as collateral security is not permitted, in the absence of special agreement, in his dealings with the securities to accept anything else in discharge or satisfaction of them from the parties bound than the face value of the paper." At p. 202: "The pledgee holds all surplus avails of such collateral securities, after payment of his debt, for the benefit of the pledgor, or of third persons equitably

entitled thereto." At p. 206: "Generally the most important consideration as to the pledgee's duty relative to collateral securities, is that perfect good faith should be observed by him in his dealings therewith." And in a foot-note to p. 207, in respect to the question of onus, it is said: "In the absence of a contract governing the disposition of a collateral security, if the pledgor claims damages on account of the failure of the pledgee to collect the security, it devolves upon the pledgor to shew that the negligence of the pledgee occasioned the loss." And at p. 208: "The pledgee of negotiable collateral paper in order to be charged, upon failure to collect, with the face value thereof, as a payment pro tanto of the principal debt, must have been guilty of such bad faith or gross negligence that it would be unjust and inequitable to the pledgor were he not so charged."

It seems to me in this case that it would certainly be unjust and inequitable to the pledgor, Barrette, if the bank could for their own purposes sacrifice the sum of $25,000, as they did in this case, when the debtor on the collateral security was absolutely good for the amount, and when the bank neither attempted to collect nor gave Barrette the right to pursue the judgment upon execution, and even yet do not assert their position in regard to the handing over of the securities or accounting for the surplus, it being borne in mind that the bank have not yet pleaded their right to compromise under the hypothecation agreement. Nowhere do the bank rely upon that hypothecation agreement as an authority in law for their position in making the settlement. It is true that the plaintiff Barrette recites the hypothecation agreement, and that the bank presumed under it to act, but that is a recital of the history of the case, and I doubt whether the bank can rely upon the plaintiff's history of the case for a legal justification for their own acts. They must in their pleadings specifically set out what their defences are, and that they rely upon their defences. The bank have not done so, but I will consider, as I think I ought to in this case, what rights that hypothecation agreement gave to the bank, later on.

I would further cite the case of Reid v. Furnival, 1 Cr. & M. 538, 38 R. R. 684. This is as to the right of the pledgee to recover the full amount of a collateral, and also it is laid down in the judgment of Bayley, B., as follows: "As soon as the plaintiff recovers the whole amount,

he becomes a trustee for the person entitled to the remainder of the money after deducting the amount which he has advanced." I also refer to 3 Am. & Eng. Encyc. of Law, p. 823, as to deposit of collaterals, and vol. 22, pp. 879 and 882, as to accounting for collaterals. Upon this question Jones on Pledges is also worth referring to, pp. 543, 572, 661, 677, 678, 714, 716. At p. 716 it is said: "A pledgee has no right to surrender a collateral note to the maker without payment. If he cannot collect it, he must return it to the pledgor. If he surrenders it without receiving payment, or makes use of it in any transaction of his own, he is chargeable with the full amount. At p. 574 of Jones it is laid down: "If a creditor holding a . . note as collateral security, pledge it as his own, he is liable to the owner for the full amount of the note, unless he clearly proves that the note was worth less than its face; the burden is upon him to prove that the note is not worth what it calls for."

As to the duties of trustees the case of Aldrich v. Canada Permanent Loan and Savings Co., 27 O. R. 548, affirmed in 24 A. R. 193, is in point. That case decided that a mortgagee who, under a power of sale, without previous inquiry of any kind, put up for sale by auction and sold in one parcel a farm and two shops in a village nearly three-quarters of a mile away, not in any way used together, was liable for the difference between the amount realized and the amount which would have been realized had the farm and shops been sold separately.

In answer to the argument of the plaintiff's counsel I was referred to Lewin on Trusts, Bl. ed., p. 747, but I cannot find much support for the contention of the defendants in that work. At p. 744, upon the question of the power of trustees to release or compound debts, it is said: "A trustee may, under circumstances, release or compound a debt, but if a trustee release or compound a debt without some fresh ground in justification, or if he sell the debt for a grossly inadequate consideration, he will be clearly answerable to the cestui que trust for the amount of the devastavit." And in answer to the contention that the bank should have acted when the Court upon Barrette's appeal reversed the judgment of the trial Judge, the bank contend that even then they were not aware who were entitled to the securities, because the syndicat intended to appeal to the Supreme Court. But in reply it is said that

was an application to the Court to set aside a Judge's order setting aside a judgment and letting the defendant in to defend, the question arose, where an affidavit of merits had to be made under this section of the Common Law Procedure Act, what it should contain, and Cockburn, C.J., at p. 306, is reported as follows: "I think it impossible to say that disclosing a defence upon the merits means nothing more than stating the existence of a defence on the merits —I think that it means something more than that, and that a defendant must do more than merely say he has a defence on the merits—he must shew on affidavit what is the nature of his defence." The other members of the Court agreed with the Chief Justice. The provision of the Common Law Procedure Act referred to was not continued by the Judicature Act, 1873 (Imp.), or in the Rules promulgated thereunder, nor is it found in the Rules in the Judicature Ordinance. The English Rule on the subject is 304, and, in so far as it is material to the question I am discussing, is as follows: "Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit." And the Rule in the Ordinance is 100, and is as follows: "Any judgment entered upon default of appearance or in delivering any pleading, or in compliance with any order, may be set aside or varied by the Court or a Judge upon such terms as may be just." The only case I can find bearing upon the question since the Judicature Act is Watt v. Barnett, 3 Q. B. D. 183. That was an application to set aside a judgment, and the question arose as to letting in the defendant upon the merits, the judgment being regular. Cockburn, C.J., at p. 185, lays down as follows: "Before letting the defendant in to defend, we must consider whether he has given us any ground for thinking that he has a substantial case which he desires to try; if he does not, we are not bound to set aside a judgment which we may think ought in the interests of justice to stand." Mellor, J., agreed with him, and the matter was appealed and came before the Court of Appeal, and is reported in the same book, at p. 363. Jessel, M.R., at p. 366, lays down as follows: "The first question then is whether the Court is satisfied that there is a good defence on the merits. If not, leave to come in ought to be refused." That was concurred in by Cotton and Thesiger, L.JJ. It is quite evident from what is laid down in this

case that a mere statement of a defence upon the merits will not be sufficient; that there must be facts set forth which would enable the Court or a Judge to decide whether or not there was matter which would afford a defence to the action. I do not mean to say that it would be necessary to go so far as to establish that the party had a defence which must succeed, but he must set forth matter of defence which would satisfy the Court or a Judge that he had good grounds for inquiry at least. In looking through the text books, I find it stated that the affidavit of merits must state facts shewing a substantial ground of defence. I refer to Arch. Q. B. Prac., 14th ed., pp. 267, 333, 334, and The Annual Practice, 1908, p. 350. I refer to these text books because it seems to me they afford an indication of what the prevailing practice must be on the subject in England; and, when I find this practice continued for such a length of time, namely, from the 14th edition of Archbold, published in 1885, down to 1908, I feel fully satisfied that the conclusion I have drawn is correct.

I must, therefore, hold that it is not sufficient on an application to set aside a regular judgment by default to merely state that the defendant has a good defence upon the merits. The affidavit must go further, and shew what the character of the defence is. It may be, however, that if I was possessed of what ought to have been before me, I might come to the conclusion that the defendant's affidavit does disclose the facts upon which his defence is intended to be raised. As there has been a large amount of indulgence in this case, and the default in entering the appearance has been sufficiently explained, I will allow Mr. Gordon to verify the statement of claim, as it is possible that if that statement of claim was verified, the defendant's affidavit would shew sufficient facts to warrant his being let in.

SASKATCHEWAN.

PRENDERGAST, J. FEBRUARY 14TH, 1908.

TRIAL.

LACHANCE v. WILSON.

Architect—Preparations of Plans and Estimates—Remuneration for—Liability of Defendant—Contract—Evidence—Conduct of Parties—Useless Work—Costs.

Action by an architect to recover $479.56 for the preparation of plans and estimates of a building for the defendant.

F. M. Brown, Saskatoon, for plaintiff.

James Straton, Saskatoon, for defendant.

PRENDERGAST, J.:—On or about 30th March, 1906, the defendant, who intended to build a hotel at Saskatoon that spring, went to meet the plaintiff at the railway station on his arrival from Regina. He did not know the plaintiff before, and his going to meet him was altogether of his own motion. The defendant's version of that interview is somewhat strange, as it would appear from it that he went to meet the plaintiff for no other purpose than to tell him that he "had no plans" and "did not want any." Later he will say in substance that his reason for continuing to interview the plaintiff was that the latter had offered to shew him how he could save money by using concrete instead of stone for the foundations.

The defendant having, however, stated that he proposed building a hotel on the plan of the "Western," a hotel in Saskatoon, the parties repaired to the latter place, where the plaintiff was boarding, and took measurements of the halls, rooms, and stairway.

After a couple of further meetings, the plaintiff went to Regina, where he prepared preliminary drawings, and, on his return (which was probably on 5th April), shewed them to the defendant. The defendant submitted them to his foreman, who objected to jogs in the walls and the particular kind of windows as too expensive, and the defendant took them back to the plaintiff. The plaintiff says that the defendant, although making certain suggestions, then told him to "go on," while the defendant says that he told the plaintiff that the drawings did not answer his purpose, and to do nothing further about them. The defendant adds that he considered that this was putting an end to their relations.

On 10th April, however, the plaintiff wrote from Regina a letter to the defendant, stating that he had taken the preliminary drawings with him, and that he would bring back the sketches completed to Saskatoon a few days later. The defendant does not seem to have taken any action by way of repudiation or protest on this letter; and it appears, moreover, that, within the 4 or 5 days following, he went to the plaintiff's office once at least, and probably twice. What happened at those meetings is the matter of much contradictory evidence.

On 16th April the plaintiff sends to defendant a form of contract for signature—which the latter seems to have disregarded or ignored.

On 22nd April one Webb goes to the plaintiff's office for the purpose of tendering on the work; but it was shewn that this was at the plaintiff's solicitation.

On 24th April one Vaughan leaves with the plaintiff a tender for the stonework and walls, and this was done at the defendant's request. Upon this occasion Vaughan saw the tracings, and I have come to the conclusion that they were not then completed.

On 28th April the defendant asked the plaintiff the estimated cost of the building, which the latter did not seem to know. After some figuring, however, he gave $23,978 as the estimated cost: whereupon, according to the defendant, he remonstrated, saying that he could only put $10,000 on the building. I think that the plaintiff should have understood then that the defendant was unwilling that he should go on with the plans. I should add that a sum of $25 which was then paid for the draughtsman, is represented by the plaintiff as having been a payment on account, and by the defendant as being merely a loan. The plaintiff's evidence is to the effect that, at that time, the tracings on blue prints were all completed; but on the whole of the evidence I must find to the contrary.

Some time in the beginning of May, the defendant, with his brother, who had also some interest in the proposed hotel, went to the plaintiff's office in the latter's absence, and, upon being told the estimated cost (which by the way he already knew), declared again to the draughtsman in charge that they would have nothing to do with the plans.

On 15th or 20th May the defendant had commenced building independently of the plaintiff's plans: the foundation was then completed, and the carpenters' work just begun.

On 25th May the plaintiff writes to the defendant, saying: "It is evident to the writer that you do not intend using the plans that were prepared for your proposed hotel. . . You never mentioned the price to me until the drawings were complete. . . . I can cut the cost of the building down."

Finally, on 27th May, when the building had reached the third storey, the plaintiff sends to the defendant the tracings and blue prints complete, which the latter returned.

I should add that the defendant was in the plaintiff's office on several occasions besides those above specially referred to.

I find also that the defendant's building resembles neither the plaintiff's plans nor the "Western," although it has features of both. But features that are common to plaintiff's plans and defendant's building, are also common to the "Western."

Then, although the defendant saw enough of the plans to derive in a general way certain useful information from them, I find that he cannot be said to have used them in the sense of having them before him, and being guided by them as the work progressed. He really never had them in his possession, except as above stated.

From the general evidence, of which the above gives only the most salient facts, I come to the conclusion that both the plaintiff and the defendant have misconceived their true position.

As to the defendant, what could his object be in going to meet the plaintiff, if it was not with reference to plans or estimates? And if he severed all business relations, as he says he did, on or about 5th April, why did he continue going to the plaintiff's office? Why did he go there with contractor Vaughan on 24th April? What concern was it to him on 28th April that the plans should call for a building of $10,000 or $25,000? And why did he go again with his brother on 10th May? He surely did not require all that time, if this was his only object, to learn whether concrete was preferable to stone for the foundation work.

I can come to no other conclusion than that the defendant never had an earnest and true intention of procuring plans and specifications, and that his purpose was to carry on meetings and interviews in such a way as not to commit himself on the one hand, while gathering on the other as much information and advice as he could from the plaintiff without having to pay for it.

The defendant, in my view of the matter, must pay for such information.

It was contended that the defendant, under the general practice, had a right to have the preliminary pencil sketch for nothing. That may be so, speaking generally, but not so here. The owner must approach the architect in good faith, and with a bona fide intention of having the work carried on further if the preliminary sketch is suitable. If it is not suitable, he must give the architect a fair opportunity of meeting his requirements by making alterations or additions, if need be, and he cannot at that stage arbitrarily sever the relations he has entered into. There must be an honest desire that the architect should meet him, or he will be liable for such services as have been rendered up to that time.

But, for all that, I find, on the other hand, that the defendant did not order the tracings and blue prints. The plaintiff knew very well, for one thing, that the defendant ignored the form of contract which he sent him to sign on 16th April. And then there is this most extraordinary statement made by the plaintiff in his letter of 25th May: "You never mentioned the price to me until the drawings were completed;" which means that the plaintiff actually completed his whole work without having inquired whether the defendant intended to put $5,000, $10,000, $15,000, or $25,000 on the building. Surely it was his duty to ascertaain this first of all, and he could not, until he did so, consider himself authorized to go on with the plans.

Most of the plaintiff's work was both unauthorized and useless; but a certain part was authorized; it is immaterial in the circumstances whether it was useful or not; and for this part the defendant is liable.

The decisions in the cases cited (Hutchinson v. Conway, 34 N. S. R. 555, Grant v. Dupont, 8 B. C. R. 71, and Campbell v. Nolan, 38 N. S. R. 74), only deal with general principles, and have no special application to the present case. For instance, in the first case, where the architect made plans which could then be carried out, at the cost stated by the owner, but such cost was later increased, owing to a rise in material and other causes over which the architect had no control, the owner was held liable for the plans.

There will be judgment for the plaintiff for $100, with costs of a small debt action—the sum of $25 already paid by defendant to be credited on said amount.

SASKATCHEWAN.

WETMORE, C.J. FEBRUARY 17TH, 1908.

CHAMBERS.

REGINA TRADING CO. v. GODWIN.

Judgment—Default Judgment—Application to Set aside—Delay—Failure to Explain Satisfactorily—Negotiations for Settlement—Dispute as to Part of Claim—Prejudice by Delay—Refusal to Open up Case.

Motion by defendant to set aside a judgment entered by plaintiffs for default of appearance and to be let in to defend.

Scott, Regina, for defendant.

W. M. Martin, Regina, for plaintiffs.

WETMORE, C.J.:—The plaintiffs' judgment was regularly signed on 17th May last. The writ of summons was served on defendant on 13th November, 1906. I think the defendant's affidavit accounting for the delay in entering an appearance is most unsatisfactory. He states that the delay was caused, in the first instance, because negotiations were entered into with the plaintiffs' solicitors for the purpose of having the action settled without further cost, and for that reason no appearance has been entered yet. He also states that his reason for the delay in making the application is that he has been absent from the city of Regina almost entirely since the judgment was entered, and, further, that it was expected that an arrangement might be made without the necessity of making this application. The affidavit of Mr. Martin, the plaintiffs' solicitor, in opposing this application, disposes of these alleged reasons for delay to a considerable extent.

In the first place I should judge that the allleged negotiations for settlement were of a very shadowy character. It seems to me that all that they consisted of was that the defendant asserted that he was not liable for the amount of $125, the price of a furnace which was included in the plaintiffs' claim, and the plaintiffs insisted that he was; and the defendant was informed shortly after he was served with the summons by the plaintiffs' solicitor that the plaintiffs insisted

that the furnace was sold to him, and that he (the plaintiffs' solicitor) would insist upon payment of the plaintiffs' claim in full. He was further notified that unless he did something towards payment, judgment would be entered against him. Even after this letter was written judgment was delayed for 4 months, and still the defendant did not appear. After judgment was signed, Mr. Martin was asked by the defendant's solicitors in June last if he would consent to the judgment being set aside, and to this request Mr. Martin refused to accede. The defendant, or his solicitors, seemed to have had full knowledge of this case as it proceeded, and the fact that the defendant was absent from Regina is no answer to such unwarranted delays, in either entering appearance in the first place or in making this application in the second.

It has been urged that mere delay is no objection to the setting aside of a regular judgment if an affidavit of merits is produced, and the parties may be restored to their former position. The authority cited for this is the remark of Bramwell, L.J., in Atwood v. Chichester, 3 Q. B. D. 722. At p. 723 that learned Judge states as follows: "When sitting in Chambers, I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This, I think, is a correct view." Brett, L.J., apparently concurred with this view; but Cotton, L.J., states as follows at p. 725: "I should have thought that if a defendant had lain by intentionally, she could not be allowed to appear." I am disposed to think that Bramwell and Brett, L.J.J., went too far in what they laid down, and the remarks of Cotton, L.J., strike me as more in accordance with law and right. I may add that in that case the defendant, in my opinion, accounted for the delay in a very satisfactory manner. I do not wish to law down any hard and fast rule as to what delay may or may not be excusable. I think the delay ought in some way or other to be accounted for; but the delay in this case has been practically wilful, I may say. Where the party has from time to time been made aware just what the plaintiff intends to do, and has simply seen fit to pay no attention to it whatever, he should not be allowed to come in at this last stage—9 months after judgment has been signed.

In this case, however, I put my refusal to allow the defendant in on another ground. The matter in dispute is a portion of plaintiffs' claim, viz., the furnace to which I have referred. The defendant contends that this furnace was supplied to another person, and not to him, and the plaintiffs contend that it was sold to defendant; and the plaintiffs' manager has sworn that the clerk who sold such furnace has left his employ and gone to British Columbia, and he can only be got back here with very great inconvenience. I am of the opinion on this account that to allow the judgment to be set aside and the defendant to come in and defend would very materially prejudice the plaintiffs in maintaining this action.

The summons will, therefore, be dismissed with costs.

SASKATCHEWAN.

WETMORE, C.J. FEBRUARY 21ST, 1908.

CHAMBERS.

SACK v. CONSTRUCTION CO.

Pleading—Statement of Claim—Application to Strike out—Prolixity——Embarrassment—Rules 109, 127.

Application by defendants to strike out portions of the statement of claim as embarrassing and as pleading evidence.

T. S. McMorran, for defendants.

W. S. Ball, for plaintiffs.

WETMORE, C.J.:—No doubt, the statement of claim is prolix and pleads evidence to some extent. I cannot say, however, that paragraph 9 is more in fault, so far as pleading evidence is concerned, than the other paragraphs attacked. I am of opinion that the statement of claim would have sufficiently set forth the cause of action by alleging that the defendants were indebted to the plaintiffs for work and labour done and material supplied therefor by the plaintiffs for the

defendants and at their request. Instead of pleading this, however, the plaintiffs have set up the circumstances under which the work was done. It has been laid down that the Court will not dictate to a party how he should frame his case. It does not necessarily follow that a plea will be struck out because it contains evidence, contrary to Rule 109. The question is, has the opposite party been embarrassed or prejudiced in any way by the evidence being pleaded? There is nothing in the statement of claim that can prejudice the defendants in any way. In fact it gives them notice of just what the plaintiffs rely on to establish their right of action against them, and it is not set forth at very great length.

In Tomkinson v. South Eastern R. W. Co., 57 L. T. at p. 360, Kay, J., dealing with Order XIX., Rule 27, of the English Rules (which is the same as Rule 127 of the Judicature Ordinance), is reported as follows: "The obvious meaning of the Rule is to prevent either party to an action from prejudicing or embarrassing or delaying the fair trial of the action by stating in his plea utterly irrelevant matter, such as I feel obliged to say one sometimes sees in pleading."

In Weymouth v. Rich, 1 Times L. R. 609, the defendant set up material as a matter of defence which was clearly as much evidence as the material complained of in this action, and the defence was ordered to be amended by Lopes, J. On appeal the Court reversed his judgment, and Lord Coleridge said that "he could see no real and substantial object in the statement of defence, and that he was, therefore, of opinion that the appeal must be allowed." A. L. Smith, J., said "that the matter complained of by the plaintiff did no more than give notice to him of what the defendant meant to say of him at the trial."

I am of opinion that this application should not be allowed, but, as the statement of claim is prolix, that the clerk should deal with it on taxation when the occasion arises. The summons will be dismissed with costs.

I do not wish to be understood as holding that in no case will a prolix pleading be set aside. I can understand that a pleading may be so outrageously prolix that it might be ordered to be set aside.

SASKATCHEWAN.

LAMONT, J. FEBRUARY 27TH, 1908.

TRIAL.

BROLEY v. MILLS.

Building Contract — Action for Contract Price—Authority of Owner for Extra Work—Performance of Contract—Specifications — Completion of Work—Material Variations and Omissions—Acceptance—Taking Possession of Building—Offer to Pay Rent—Mechanics' Liens—Judgment for Enforcement.

Action for the enforcement of a mechanic's lien registered by the plaintiff against the property of the defendant, the plaintiff claiming $1,257 for the construction of a factory for the defendant.

D. Keith, North Battleford, for plaintiff.

A. Brehaut, North Battleford, for defendant.

LAMONT, J.:—The defence is that the contract price claimed by the plaintiff is not the price agreed upon, and that the building was not erected according to the specifications.

In the spring of 1907 the plaintiff constructed a factory for the defendant on lot 1 in block 51 in the townsite of North Battleford. The contract price of the building I find to have been $852. The building was to be according to certain specifications, and without a floor. Before the building was completed, the plaintiff wrote the defendant stating that he thought he (the defendant) would experience difficulty with a building 40 ft. x 80 ft. without a floor, owing to the high winds that prevailed in the spring, and advised him to put in a floor, and stated that he would put down a single ship-lap floor, which would do for that year, for $350, and asked the defendant to wire him if he wanted the floor put in. The defendant wired to put in the floor, which the plaintiff accordingly did. The defendant came with his machinery for the factory, and, on examining the building, objected to the centre posts not being on cement footings, and to the construction of the roof, but took possession of the building,

and has occupied it ever since. Some conversations as to payment took place between the plaintiff and defendant, at which the plaintiff says defendant did not dispute his account, and promised to pay if he could get a loan, and, not being able to get the loan, offered to pay rent. The defendant denies promising to pay for the building, but admits offering to pay rent.

On 21st May, 1907, the plaintiff, not being paid, registered a mechanic's lien against the lot on which the factory had been built, and has now brought this action to enforce his lien.

The claim of the plaintiff is made up of: (1) the contract price of the building as agreed between the plaintiff and defendant, which I find to have been $852; and (2) the price of the additional floor, which I find to have been put in by the plaintiff on the authority of the defendant's telegram, at an agreed cost of $350.

As to the floor, which formed a separate contract from the one to erect the building, I find that it was put in in accordance with the terms of the plaintiff's letter of 2nd April, 1907, and that these terms were agreed to by the defendant. The plaintiff, therefore, as to the $350 for the additional floor, is entitled to succeed.

As to the contract to erect the factory; the agreement was that the plaintiff would supply material and put up the factory according to the specifications for $852. The defendant contends that the plaintiff failed to put up a building in accordance with the contract entered into and the plans and specifications therewith. I find on the evidence, and it was admitted by the plaintiff, that, according to the contract, the centre posts, to which the shafting machinery was to be attached, were to be set on cement footings, and that this was not done; but that, instead, the plaintiff ran a sill the length of the building, and the centre posts were set on the sill. This, according to the evidence of the defendant, deprived the posts of the solidity they would have had if they had been set on cement footings, with the result that when the machinery was in operation there was such vibration that the machinery would not properly work. The reason given by the plaintiff for not putting in the cement footings was that at the time he was putting up the building the weather was too cold to put in cement footings.

It was also admitted by the plaintiff that, according to the contract, the roof was to have a 4-foot pitch, and that it

was built with only a 2-foot pitch; the reason for this change being that he could not at the time get material sufficiently long to make a 4-foot pitch.

On these facts, as admitted by the plaintiff, the defendant's counsel contended that the contract not being performed the plaintiff was not entitled to recover.

The law as to the right of a contractor to recover in cases like the present has been laid down in a number of decisions, and it is this: that where there is a contract to erect a building according to certain specifications, for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless the defendant has accepted the work with a knowledge of the defects, or has done something from which a new contract to pay for the work done can be inferred: Ellis v. Hamlin, 3 Taunt. 52; Munro v. Butt, 8 E. & B. 738; Sumpter v. Hedges, [1898] 1 Q. B. 673; Sherlock v. Powell, 26 A. R. 407.

Trifling variations from the specifications or omissions in unimportant details will not, however, preclude the contractor from recovering: French v. Holtby, 1 O. W. R. 821.

Here, however, the variations from the specifications were not trifling, but were most material, and go to the essence of the contract. The object of the defendant in stipulating that the centre posts be placed on cement footings was to insure solidity and prevent vibration when the machinery was in operation, and the non-compliance with this stipulation has rendered the building less useful to the defendant.

The plaintiff, not having erected a building in accordance with the terms of the contract, cannot, under the principle of law above cited, recover the price therefor, unless he can shew that the defendant accepted the building with the knowledge of its defects and acquiesced in the variations from the specifications.

The facts upon which he relies as shewing an acceptance of the building by the defendants, are: (1) that the defendant, after knowledge of the variations from the specifications, took possession of the building and has used and occupied it ever since for the purpose for which it was erected; and (2) that when the plaintiff asked the defendant for payment he offered to pay $30 per month rent.

The taking possession of a building erected on a man's own land, and the using of the same, is not of itself a suffi-

cient acceptance of an incomplete or imperfect performance of a contract to erect the building so as to entitle the contractor to recover: see Wallace on Mechanics' Liens, p. 66.

In McArthur v. Dewar, 3 Man. L. R. 72, Killam, J., said: "The owner of the land has not an option of giving up the benefit received; the portion of the building erected has become a part of his land, and is not severable therefrom, and the mere retention of the erection upon the lands, and the use of it with the other portion of the lands, cannot give rise to an implied contract to pay for the work done." And in Black v. Wiebe, 1 W. L. R. 75, Perdue, J., laid down the same principle in these words: "The building, although incomplete and unsatisfactory, is upon the owner's land, and is perhaps partly paid for. The owner may, although protesting against its incomplete or unsatisfactory state, be compelled to use and occupy it unless he abandons his land until the dispute is settled. Occupation under these conditions should not be construed as an acceptance."

In the present case it was admitted by the plaintiff that the defendant, on arriving at North Battleford with his machinery, did protest against the alteration from the specifications as regards the cement footings for the centre posts. He also complained of the construction of the roof. But what could he do except take possession of the building? His machinery was on the ground, and, in the language of Perdue, J., in the case above cited, he was "compelled to use and occupy it unless he abandoned his land until the dispute was settled." The taking possession of the building by the defendant, and his using it, cannot, therefore, be considered an acceptance of the same by him.

Further, I am of opinion that the offer on the part of the defendant to pay $30 per month rent for the building does not help the plaintiff's case. The plaintiff in his evidence states that the defendant offered to pay rent, because he had no money wherewith to pay for the building. The defendant states that he refused to accept the building, but that he wanted to do the square thing with the plaintiff, and offered to pay him $30 a month for its use. The offer to pay rent is, to my mind, inconsistent with the acceptance by the defendant of the building.

As to the $852, the contract price of the building, the plaintiff, not having performed the contract, cannot recover.

There will be judgment for the plaintiff for $350 and costs, including the costs of drawing and registering the lien.

If the judgment and costs are not paid within one month, the estate and interest of the defendant in the lands charged with the plaintiff's lien may be sold to satisfy the same. As the abstract of title of the said land, which was not filed until after close of the case, shews a mechanic's lien registered prior to the lien of the plaintiff, the sale of the said land will be subject to the rights (if any) of the prior lienholders under their lien.

In case a sale is necessary, at least one month's notice thereof shall be given to the defendant, and notice of the sale shall be inserted in at least two issues of a newspaper published in the judicial district in which the land is situated.

YUKON TERRITORY.

CRAIG, J. FEBRUARY 8TH, 1908.

TRIAL.

BARRETTE v. CANADIAN BANK OF COMMERCE AND SYNDICAT LYONNAIS DU KLONDIKE.

Banks and Banking — Collateral Security Deposited with Bank to Secure Payment of Promissory Notes and Advances—Memorandum of Hypothecation — Judgment — Settlement—Account—Fiduciary Relationship—Trustees —Breach of Trust—Failure to Exercise Due Diligence in Realizing Securities—Bona Fides—Tender of Reconveyance—Laches—Interest—Rate of—Overpayment—Illegal Rate—Contract—Pass-book—Estoppel—Parties—Costs.

Action to recover a balance to be due to plaintiff from a collateral security deposited with the defendants the Canadian Bank of Commerce.

F. T. Congdon, K.C., J. B. Pattulo, and J. M. Carson, for plaintiff.

F. J. Stacpoole, for defendants the Canadian Bank of Commerce.

Henry C. Bleecker, for defendants the Syndicat Lyonnais du Klondike.

CRAIG, J.:—This action, put shortly, is instituted by the plaintiff to recover the balance which he claims from a collateral security deposited with the bank to secure the payment of certain promissory notes and advances made by the bank to him. How the Syndicat Lyonnais du Klondike are brought into the action will appear from the history of the case, and to thoroughly understand the case a history of the transaction must be given.

The plaintiff is a gold miner. By his evidence it appears that he is a French Canadian, who, when he came into this country and in the early days of this transaction, spoke very little English. To-day he speaks English fairly well after a 10 years' intermingling with English-speaking people. He engaged in placer mining at the time of the rush in here in the early days before 1898. Prior to 1900, and up to the time when the securities covered by this transaction were given, plaintiff was dealing with the defendant bank, obtaining advances from them. He says he was a personal and an intimate friend of Mr. H. T. Wills, the then manager of the defendant bank; that when he came to town he stayed at his house; that Mr. Wills did all his business for him, and he trusted him implicitly, signing whatever he asked him to sign, and relying entirely on what he did, so much so that some of the deeds or bills of sale for placer properties were taken in Mr. Wills's name, and it appears later on in the evidence that they were actually partners in some transactions. To secure the advances, which were large, plaintiff gave to the bank, or to Wills as trustee and other officers of the bank, mortgages upon his placer mining claims. On 21st June, 1901, the defendants the syndicat purchased plaintiff's property for $167,500, paying on account of the purchase $75,000 in cash, and giving to the plaintiff as security a promissory note for $92,500 and mortgages collateral to the note. The $75,000 was promptly paid into the Bank of Commerce and credited to plaintiff on his indebtedness; the mortgages which the bank held from the plaintiff were released; and the bank took an assignment of the mortgage on the placer mining property and the chattels sold to the syndicat. At that time plaintiff's liability was about $42,000 over and above the $75,000 paid in. On 22nd June, 1901, plaintiff hypothecated the note of the syndicat to the bank, on their general hypothecation form, and, as this instrument is very material, and will be considered later on, I shall give it in full. It is

mind, sufficiently shewn by the fact that on 12th March following the defendant wrote them calling their attention to the fact that certain cars ordered by him under that order had not been delivered, and that a draft reply to that letter in the handwriting of the plaintiffs' manager, indorsed thereon, gives certain reasons why certain cars under that order had not been sent, but does not repudiate the order for the 12 cars, nor question the fact that a contract for the delivery thereof had been entered into by the plaintiffs.

The order for the 12 cars (hereinafter referred to as order No. 50) is the only one bearing date 6th September, 1905. Only two orders are shewn to have been given by the defendant prior to that date, viz., order 48 for two cars and 49 for one car, both dated 6th August, 1905. All the orders given subsequent to order 50 are merely specifications under that order, except an order dated 12th February, 1906, which was a special order.

The evidence shews that, subsequent to the date of order 50, the plaintiffs shipped to the defendant 12 cars, the invoices for which were produced by the latter.

With the exception of those for the first two cars shipped, they state on their face the orders under which they were shipped, and they shew that 5½ cars were shipped under the order of 6th September, 1905, two under orders of 14th of same month (which were orders under 50), one under order 49, and one under order 48, 6th September, 1905. As to the latter, a mistake has been made either in the date or in the number of the order. I find that the lumber shipped by that car does not correspond with that ordered by 48, and that it is within that specified by order 50, and, as it was a delivery long after the date of the latter order, it is not unreasonable to assume that it was a delivery under it. I have shewn that the defendant must have had notice immediately after the shipment that plaintiffs asserted that the lumber contained in at least 7½ cars were deliveries under order 50, yet he offered no objection thereto at the time he received the notice. It is true that in his letter of 12th March, 1908, already referred to, he states that only 4 cars had then been received, and the invoices shew that 6½ had then been shipped. It may have been the case that all those shipped had not then reached him, but, even if that were not the case, I think that, in view of the statements contained in the invoices, I should not accept his statement as correct.

As the invoices for the first two cars shipped contain no statement as to the orders under which they were shipped, and as they were shipped shortly after the date of order 50, I think they may refer to orders 48 or 49, or both. At all events, the plaintiffs have not satisfied me that they were deliveries under order 50. I, therefore, hold that the plaintiffs have delivered 8½ cars under order 50, and no more.

One of the reasons given by the plaintiffs' manager, in his reply referred to, for not delivering some of the cars then upon order, was that they specified that some of the lumber should be "fir," and the plaintiffs now contend that they were not bound under under 50 to supply fir lumber. The evidence, however, satisfies me that, by usage in the lumber trade, that word does not, except in the case of flooring, mean lumber manufactured from fir trees alone, but means and includes that manufactured from pine, spruce, larch, and hemlock. This view is supported by the fact that in an order for a car of boards sent by the defendant on 8th November, 1905, fir was specified, yet the plaintiffs filled the order with lumber of which only a small proportion was manufactured from fir trees, and without communicating with the defendant.

The defendant is entitled to damages for the non-delivery of the 3½ cars which plaintiffs failed to deliver. It is shewn that the average car-load is 20,000 feet. The average market price, within the terms of order 50, at the time the lumber should have been delivered, viz., within a reasonable time after it was ordered, is shewn by the price lists produced at the trial to have been $18.85, which is $3.35 in excess of the contract price. I, therefore, give judgment upon the counterclaim for $234.50 and costs.

ALBERTA.

BECK, J. FEBRUARY 13TH, 1908.

CHAMBERS.

GARDNER v. GORMAN.
ROSS v. GORMAN.

Mechanics' Liens—Actions to Enforce—Consolidation—Parties—Lien-holders — Practice—Alberta Mechanics' Lien Act, secs. 18, 19, 20.

Summons by certain of the defendants for an order consolidating the actions, which were brought to enforce mechanics' liens.

C. F. Newell, for the applicants.

H. H. Parlee, for plaintiffs in the first action.

O. M. Biggar, for plaintiffs in the second action.

BECK, J.:—The first named action was commenced on 7th August, 1907; the plaintiffs are four persons claiming as lien-holders; the defendants are the owner, and apparently a sub-contractor, and other lien-holders.

The second action was commenced on 13th August; the plaintiffs are three persons claiming as lien-holders; the defendants the owner and the administratrix of the estate of the deceased contractor.

An application by summons is made by the defendants other than the lien-holders and the administratrix for an order consolidating the actions; and only the solicitors for the plaintiffs in each of the actions were served with the summons.

No defence has been filed in either action.

The sections of the Mechanics' Lien Act which come under consideration are secs. 18, 19, and 20.

I think the meaning of these sections, so far as the question under consideration is concerned, is this: Once an action to enforce a mechanic's lien is commenced, it is improper for another lien-holder, in respect of the same subject matter, to commence an action, because all suits or proceedings brought by a lien-holder shall be taken to be brought on behalf of all lien-holders who became parties thereto within the time limited for instituting proceedings to realize their liens: sec. 18.

The method by which such other lien-holders may become parties to the action first commenced is "by order of a Judge upon ex parte application supported by affidavit stating the particulars of the claim:" sec. 18.

Any lien-holder so joined is to be deemed to have instituted proceedings to enforce his lien: sec. 18.

If, however, the improper course of commencing two or more actions is adopted, the owner or contractor may relieve himself of liability to pay costs in the subsequent action or actions by applying to consolidate; but, failing to do so, he becomes liable to the costs in the additional action or actions: sec. 19.

Furthermore, any party interested may apply to consolidate: sec. 20.

In view of my interpretation of these sections, I think the proper order is that the second action be consolidated with the first action; that it be declared that the plaintiffs in the second action will, in the case of success, be entitled to such costs only as would have been incurred on an ex parte application to be joined in the first action; that the plaintiffs in the second action pay the costs of this application to the applicants in any event on final taxation.

In the first action I order that the parties defendants who were made parties on the ground that they had registered liens, namely, Ross Brothers Limited, the W. H. Clarke Co. Limited, and the Northern Hardware Company Limited, who are the plaintiffs in the second action, be struck out. If they have incurred any costs as defendants, the plaintiffs in the first action must pay them. I will fix the amount, if any have been incurred.

I strike these parties out not because they are plaintiffs in the first action, but because I think they were unnecessary, if not also improper, parties.

I think a lien-holder first instituting proceedings can proceed to realize his lien independently of other lien-holders; their protection is by means of an application to be joined as provided in sec. 18.

There may be some uncertainty as to the proper procedure in the consolidated action. If necessary, I will give directions.

Section 40 contemplates the necessity for the making of general rules of procedure.

ALBERTA.

SCOTT, J. FEBRUARY 17TH, 1908.

SINGLE COURT.

WOODWARD v. KOSOWAN.

Vendor and Purchaser—Agreement for Sale of Land—Purchase Money—Default in Payment—Remedy—Judgment—Sale of Land.

Motion by plaintiff for judgment on default of appearance.

H. A. Mackie, for plaintiff.

No one for defendants.

SCOTT, J.:—The plaintiff's claim is under an agreement for the sale of lands dated 20th February, 1906, whereby he agreed to sell to the defendants certain lots in Vegreville for $750, payable $375 at the date of the agreement, and the balance on 20th February, 1907, with interest at 8 per cent.

The agreement contained a proviso to the effect (inter alia) that, if the defendants should fail to pay the balance of the purchase money at the time fixed therefor (time being of the essence of the agreement), the plaintiff should have the right to declare the agreement void, by written notice to that effect served upon the defendants or mailed to them by registered letter at Vegreville, whereupon all the defendants' rights under the agreement should cease and determine, and they should forfeit any right to reclamation or compensation for moneys paid under it.

The plaintiff alleges default in payment of the balance of the purchase money, and that, on or about 16th April, 1907, he gave to the defendants by registered letter the written notice referred to in the proviso.

He claims payment of the balance of the purchase money and interest, and, in default of payment, an order declaring the agreement null and void and any moneys paid thereon forfeited to him. In the alternative he claims a sale of the property and judgment against the defendants for any deficiency in the amount realized.

The plaintiff has shewn by affidavit that the whole of the instalment which became due on 20th February, 1907, is still due and unpaid. He also shews that the notice of 20th April, 1907, referred to in the statement of claim, was merely a notice demanding payment of the amount then due under the agreement, but he has failed to shew that he has taken the necessary steps, under the proviso referred to, to cancel the agreement. It is, therefore, unnecessary for me to consider the effect of that proviso.

The order to which the plaintiff is entitled is an order directing the clerk to tax his costs of suit up to a time not less than 3 months from the date of his certificate, for the payment into Court by the defendants of the unpaid portion of the purchase money, with the interest accruing due thereon up to the time of such payment, and the costs so taxed, and that, in default of such payment, the lands comprised in the agreement be sold by public auction under the direction of the Court; further directions to be reserved.

ALBERTA.

SCOTT, J. FEBRUARY 25TH, 1908.

SINGLE COURT.

WHITE v. EDGAR.

Summary Judgment—Rule 326—Special Circumstances.

Motion by plaintiff for judgment pursuant to leave granted by BECK, J., after the close of the pleadings. The motion was founded upon admissions made by the defendant in his examination for discovery and upon facts disclosed in the affidavits filed upon the application.

C. A. Grant, for plaintiff.

W. B. Allison, for defendant.

SCOTT, J.:—Counsel for the plaintiff stated that the application was made under Rule 326. That Rule appears to be taken from Rule 608 of the Ontario Rules, and there is no corresponding Rule in England. The construction placed upon it by the Ontario Courts before its introduction here was that it was applicable only to cases in which special circumstances existed which necessitated a hearing out of the ordinary course: see Holmested & Langton, 3rd ed., p. 808, and the cases there cited. I think the same construction must be placed upon it here, and, as no special circumstances have been shewn to exist in this case, the application must be dismissed. Costs to be costs in the cause to the defendant in any event. No order to be taken out except in the event of an appeal.

SASKATCHEWAN.

LAMONT, J. FEBRUARY 4TH, 1908.

CHAMBERS.

SHORE v. HEWSON.

Practice—Originating Summons—Service out of the Jurisdiction—Order Authorizing Service — Copy Served not a True one—Absence of Prejudice—Rule 538—Irregularity —Affidavit—Cause of Action—Rule 18.

Application by defendant to set aside an originating summons and order for service of the same ex juris, and

the service thereof on the defendant, upon the following grounds:—

1. Because the defendant was not served with a copy of the original originating summons.

2. Because the order giving leave to serve the originating summons on the defendant out of the jurisdiction was not supported by an affidavit stating that in the belief of the deponent the plaintiff had a good cause of action.

3. Because the order was not supported by an affidavit stating the grounds on which the application was made.

4. Because the order allowing service ex juris was not obtained before the originating summons was issued.

H. V. Bigelow, Regina, for defendant.

J. A. Allan, Regina, for plaintiff.

LAMONT, J.:—As to the first of the above objections, it was shewn that the plaintiff in taking out the originating summons had embodied therein the order giving leave to serve the defendant in Gliechen in "the province of Alberta," instead of taking out a separate order, as he should have done. The copy served of the summons upon the defendant was not a true copy of the original, inasmuch as it had the words "the province of Manitoba," instead of the words "the province of Alberta," in the clause embodying the order for service ex juris. The defendant was properly served in the province of Alberta, and in no way was prejudiced by the fact that the copy was not a true copy of the summons. Is this an irregularity which would justify the setting aside of the summons or the service thereof? I do not think it is. The only respect in which the copy differed from the original was in the order for service ex juris. I cannot find anything in the Rules of Court which requires the order for service ex juris to be served on the defendant at all, and, if there is no obligation to serve the order at all, I am of opinion that the service of an incorrect copy, particularly where the defendant has not been injured or put to any inconvenience because of the incorrectness of the copy, is not a sufficient ground for setting aside the summons or the service thereof: Reynolds v. Coleman, 36 Ch. D. 453.

Rule 538 of the Judicature Ordinance reads: "Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void, unless the Court or

a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the Court or Judge may think fit." This Rule gives the Court or a Judge power to relieve against an irregularity if it or he thinks fit so to do, and the present case is one in which I think the irregularity ought to be relieved against. See also Dickson v. Law, [1895] 2 Ch. 62.

The second objection is that the affidavits on which the leave for service ex juris was obtained, did not state that, in the belief of the deponent, the plaintiff had a good cause of action. This is required by Rule 19. It is true that the affidavit used did not state this in exactly that language, but the plaintiff in his affidavit which was read on the application stated that he was the mortgagee and the defendant the mortgagor in a certain mortgage; that the defendant had made default in the payments under the mortgage; and that there was due and owing to him from the defendant in respect thereof the sum of $7,246. In Fowler v. Barslow, 51 L. J. Ch. 104, Jessel, M.R., said: "The rule is that when the facts are stated in the affidavit, it is not necessary to say in words 'there is a good cause of action.'" The affidavit of the plaintiff sets out facts which satisfy me that he had a good cause of action.

The third objection is that the affidavit does not state the grounds on which the application was made. Rule 19 requires the grounds to be stated in the affidavit. This means that facts should be set out in the affidavit which bring the plaintiff's case within one of the sub-sections of Rule 18 of the Rules of Court. Does the affidavit of the plaintiff shew facts which bring his action within one of these sub-sections? It is the usual affidavit of default, reciting a mortgage on land within the province, and stating that the defendant has made default in the payments under the mortgage, and that there was now due and owing thereon a certain sum of money. The originating summons which by the order moved against the plaintiff had leave to serve out of the jurisdiction asked for the sale or foreclosure of the land mentioned in the affidavit as mortgaged to the defendant. The application for the originating summons and the application for leave to serve it ex juris were made at the same time. These facts seem to me to bring the case within clause 1 of Rule 18, which allows service of a writ of summons out of the jurisdiction where (1) "the

whole subject matter of the action is land within the judicial district in which the action is to be brought." Rule 472 makes this provision apply to an originating summons. The affidavit of the plaintiff states that the land is within the judicial district in which the summons is to be issued, and, as the summons is for sale or foreclosure of this very land, I am of opinion that there were sufficient facts shewn to satisfy the Judge that the whole subject matter of the action was land within the jurisdiction.

As to the last objection, the facts shew it to be untenable.

The application will therefore be refused, but, as the plaintiff was guilty of irregularities, I will allow no costs.

SASKATCHEWAN.

JOHNSTONE, J. FEBRUARY, 1908.

TRIAL.

WIN GAT v. JOHNSON.

Trespass—Forcible Entry of Premises by Police Officer—Gambling House — By-law of City — Justification—Absence of Warrant—Criminal Code, sec. 575—Gambling Instruments Destroyed by Justices' Order—Moneys Taken from Till—Damages—Nominal Damages.

Action brought by one Win Gat, carrying on the business of a Chinese merchant and lodging house keeper at Moose Jaw, against W. P. Johnson, chief constable of the same place, for damages for forcible entry by the defendant into the premises of the plaintiff, and for the conversion by the defendant of the plaintiff's goods.

G. E. Taylor, for plaintiff.

C. E. Armstrong, for defendant.

JOHNSTONE, J.:—The defendant in his defence denies the property of the plaintiff in the premises in question and in the goods referred to in the statement of claim, as well as the forcible entry and the taking and conversion of the goods. No plea of not guilty under any statute is set

up, but it is alleged in the defence that there was no notice of action given by the plaintiff to the defendant, and (as an alternative defence) justification of the entry, etc., under a by-law of the city containing the following provision: "8. No person shall keep or maintain any gambling house within the limits of the said city, and any justice of the peace having jurisdiction within the said city may cause to be destroyed any Faro Bank, Rouge et Noir, Roulette table, or any device for gambling found in any house in said city, and it shall be unlawful for any person whatsoever to resort to or frequent or enter such house, unless it shall be made to appear that he did so for some good and lawful purpose, and it shall be the duty of any constable of the said city or any member of the North-West Mounted Police, from time to time, to enter into every such house and to arrest every such person found therein, and to bring such person so arrested before the proper authorities to be dealt with according to law, and to seize every Faro Bank, Rouge et Noir, Roulette table, and every other device for gambling found therein, and to cause the same to be safely kept until disposed of according to law."

The evidence adduced at the trial established beyond question property in the plaintiff in the premises sufficient to entitle him to bring the action; his property in the goods alleged to have been taken and converted by the defendant: the forcible entry into the premises by the defendant, and the arrest of several persons found gambling therein, which entry was made without a warrant authorizing the entry and search of the plaintiff's premises. This all took place on the night of 22nd July, 1906.

The persons so arrested were afterwards convicted of gambling; and certain gambling devices, with other goods supposed to be such, taken by the Royal North West Mounted Police some time after the raid, were by the convicting justices ordered to be destroyed. These are the goods claimed by the plaintiff to have been converted by the defendant.

Certain moneys which had been, prior to the entry by the defendant, contained in a combination locked drawer in the premises, were abstracted by some one during or after the entry, and these are the moneys referred to in the statement of claim as having been taken from the till by the defendant, in support of which claim there was no evidence.

The main question in this case, to my mind, to be determined, is, whether or not the defendant can justify his acts under the provision of the said by-law referred to, the entry complained of having been effected in the honest belief that such by-law was a good and valid one and would afford protection for anything done under or in pursuance of its provisions.

Having in view the provisions of sec. 575 of the Criminal Code, and the many decisions which have been rendered in actions against police officers for similar acts committed by them, and so committed either without a warrant at all or under a defective one, I have arrived at the conclusion that the defendant in doing what he did on the night in question acted illegally and rendered himself liable.

In my opinion, however, the plaintiff is not entitled to recover from the defendant on account of moneys taken from the plaintiff's till, through the arrest with others of the plaintiff's servant in charge thereof and of the premises, nor is the plaintiff entitled to damages for the loss of his goods destroyed by order of the justices: Glover v. London and South Western R. W. Co., L. R. 3 Q. B. 25.

I think because of the character of the house entered, the plaintiff should recover nominal damages only.

Judgment for the plaintiff for $1. No costs to either party.

SASKATCHEWAN

LAMONT, J. FEBRUARY 6TH, 1908.

TRIAL.

McDONALD v. LAWLOR.

Principal and Agent—Authority of Agent—Scope of—Agent in Charge of Branch Office of Lumber Dealers—Authority to Take Promissory Note of Third Person in Discharge of Debt—Repudiation by Principal—Retention of Note as Collateral Security—Ratification—Evidence—Action for Debt.

Action to recover $220.88, the price of lumber sold and delivered to the defendant. The defence was that the account was paid by indorsing and delivering to the plaintiffs'

agent a promissory note of one Bowman, and assigning to the plaintiffs a chattel mortgage given by Bowman to the defendant to secure payment of the note. The plaintiffs replied that their agent Merrill had no authority to accept the note and mortgage as payment of the account.

A. L. Gordon, for plaintiffs.

H. V. Bigelow, for defendant.

LAMONT, J.:—The following facts appear from the evidence. The plaintiffs are general merchants and lumber dealers, having their head office at Qu'Appelle, with a branch of their lumber business at Balcarres. The defendant is a rancher living 30 miles north of Balcarres. Up to 10th July, 1906, the plaintiffs' branch at Balcarres was managed by one T. H. Barnes; after 10th July, by J. M. Merrill. During the spring of 1906 the defendant purchased from time to time from the plaintiffs' branch at Balcarres quantities of lumber, until on 10th July the account amounted to $190.25. Towards the end of June or the beginning of July the defendant asked Barnes if he would take a note made by A. Bowman for $310, secured by a chattel mortgage, in payment of his lumber account of $190.25, and give the difference in lumber. Barnes thought the matter might be arranged, and said he would see McDonald, who was the general manager of the plaintiffs, and let the defendant know later. He did see McDonald; McDonald refused to buy the note, but said he would take it as collateral security. On 10th July Barnes left the employ of the plaintiffs, and J. M. Merrill was appointed their agent at Balcarres. Merrill, being new in the office, consulted Barnes on several occasions in reference to matters connected with the business. The defendant, hearing that Barnes was out of the plaintiffs' employ, wrote to him asking if the arrangement discussed as to the note and mortgage could be carried out. Barnes wrote to him telling him to bring down the note and mortgage, and the deal would be put through. He came down, and, with Barnes, went to the plaintiffs' office, and Barnes there stated to Merrill that he had been up to Fort Qu'Appelle and had seen McDonald, and that McDonald had agreed to take the note and mortgage made by Bowman in Lawlor's favour in payment of Lawlor's account, and give him the difference in lumber. Merrill, believing that the general manager

of the plaintiffs had agreed to accept the note and mortgage in payment of the defendant's account, took an assignment of the mortgage and the note, and gave defendant a receipt for the payment of the account then due, and the same day gave him lumber on account of the difference, to the amount of $29.87. The note was indorsed by the defendant "without recourse," and when he handed it over he called attention to the fact that he was indorsing it "without recourse." Barnes asked him what he meant by that. The defendant explained that he did not want the plaintiffs coming back at him for the amount of the note. The agent Merrill forwarded the note and mortgage to McDonald, who immediately replied that he had not agreed to buy the note; that he had refused to take it except as collateral security; and directed him not to let the defendant have any more lumber on account of the note. The defendant, a few days afterwards, sent his man for the balance of the lumber, but the agent refused to give it, and sent the defendant a letter stating that Mr. McDonald had refused to carry out the arrangement. The note was not due for some time, and the plaintiffs kept both note and mortgage until they became due, when the note was put in the bank for collection. It was not paid, and the note went to protest. The plaintiffs now bring this action for the price of the lumber sold to the defendant, and have retained possession of the note and mortgage.

In determining whether or not the taking of the note and mortgage by Merrill was a settlement of the defendant's account so as to relieve him of any further liability in reference thereto, the first question to be considered is, had the plaintiffs' agent Merril authority to take the note and mortgage in payment of the defendant's account? If he had, the plaintiffs are bound by his act. There was no express authority. Both McDonald and Merrill testified that the authority which Merrill had in connection with the Balcarres office was to sell the lumber and collect the pay therefor, and, in cases where credit was given, to take the debtor's own note for the amount of his indebtedness. He had no authority to make any other kind of settlement. That had to be referred to McDonald. This is corroborated by the witness Barnes, who was called for the defendant, and who stated that during all the time he was acting as the plaintiffs' agent at Balcarres he had no authority to take the note of a third person in payment of an account

due to the plaintiffs, and in fact he had never taken one. I am satisfied that the agent Merrill had no express authority to take the note and mortgage in settlement of the defendant's account. Neither was there any implied authority. The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of his express authority. It does not, however, extend to acts which are outside the ordinary course of his business, or which are neither necessary or incidental to his express authority: Halsbury's Laws of England, vol. 1, sec. 357.

Was the taking of Bowman's note incidental to the ordinary course of the business? It cannot be contended that it was. In the whole course of business at that office the evidence shews that on no previous occasion had a note of a third party been taken as payment by the agent. This was the only transaction of its kind, and, in my opinion, was not within the scope of the authority of the agent. The agent took it believing the statement made to him by Barnes that McDonald had authorized it.

Another point strongly urged on behalf of the defendant was that, even if the agent had no authority to take the note and mortgage in the first instance, the plaintiffs by retaining them have shewn such acquiescence in the arrangement that they must be considered as ratifying it. This contention seems to me to be untenable. The evidence shews clearly that, so far from ratifying or acquiescing in the settlement, Mr. McDonald expressly repudiated it the moment it came to his notice, and directed the agent not to supply any more lumber to the defendant. This action is entirely inconsistent with the theory of ratification as contended by the defendant's counsel. In Marsh v. Joseph, [1897] 1 Ch. 213, it was held that to constitute a binding ratification of acts done without previous authority there must be full knowledge by the principal, and the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent whatever they were. In the present case the only circumstance from which ratification can be inferred is the retention by the plaintiffs of the note and mortgage, and the fact that they placed the note in the bank at maturity for collection. The plaintiffs explained this by saying that McDonald agreed with Barnes to take the note and mortgage as collateral security, and they claim to hold it as such.

The defendant has in no way been prejudiced by their retention. Do these circumstances, taken in connection with McDonald's repudiation of the settlement, warrant the clear inference that he was adopting the settlement made by the agent Merrill? Clearly not. The acts relied on to shew ratification must be clearly referable to the act of the agent of which ratification is claimed, and must shew a clear intention to adopt it: De Busche v. Alt, 8 Ch. D. 286.

The retaining of the note and mortgage is the only act of the plaintiffs by which it is contended they ratified a settlement. This retention was due to the fact that McDonald considered he had a right to hold them as collateral security. Under the circumstances it cannot be inferred that their retention is any evidence that the plaintiffs intended in so retaining them to adopt and ratify the act of their agent.

There will be judgment for the plaintiffs with costs.

The defendant's counterclaim is dismissed with costs.

SASKATCHEWAN.

WETMORE, C.J. FEBRUARY 12TH, 1908.

CHAMBERS.

STEWART v. McMAHON.

Judgment—Motion to Set aside Default Judgment—Affidavit of Merits — Necessity for Shewing Grounds of Defence—Delay Explained—Indulgence—Leave to Supplement Affidavit.

Motion by defendant to set aside the judgment entered by the plaintiff against the defendant for default in pleading.

A. L. Gordon, Regina, for the defendant.

T. S. McMorran, Regina, for the plaintiff.

WETMORE, C.J.:—The application has proceeded in a very irregular manner. A summons was granted on the affidavit of Mr. Gordon, one of the defendant's solicitors,

and the only ground appearing by that affidavit was that the judgment was signed against good faith. Leave, however, was given in the summons to file further material on the return. On such return the ground that the judgment was signed against good faith was abandoned, and an affidavit was made by the defendant setting up that he had a good defence to the action on the merits, and an affidavit was also filed, made by Mr. Allen, another of the defendant's solicitors. This last mentioned affidavit and that of Mr. Gordon set out reasons why the delay in entering the defence occurred. I think the reasons so set out satisfactorily account for the delay. The defendant's affidavit stated that he had a good defence to the action upon the merits, and then went on to allege that he never at any time admitted liability to the plaintiff in the sum sued for, as set out in the statement of claim, or in any other sum, and that there had been dealings between the plaintiff and himself covering a couple of years, and no settlement had been made between them in connection with such dealings. The statement of claim was not verified, and it has not been brought under my notice what the cause of action herein is, and therefore I can form no conclusion as to whether or not the defendant's allegations are pertinent to the cause of action.

It was urged, however, that, under the circumstances, it was sufficient to allege that the defendant had a good defence to the action upon the merits, and that it was not necessary to disclose the character of such defence. This, of course, raises the question whether, in an application to set aside a judgment by default regularly signed (for I must hold this judgment to be regularly signed), it is sufficient for the defendant merely to state in his affidavit that he has a good defence on the merits. Some doubt seems to be entertained with respect to it, and it is as well to set the matter at rest.

Under the old practice, before the Imperial Common Law Procedure Act was enacted, it was sufficient in such cases for the defendant merely to swear that he had a good defence upon the merits. Section 27 of the Common Law Procedure Act, 1852 (Imp.), authorized a Judge to let in a defendant to defend after final judgment "upon an application supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits." In Wiley v. Wiley, 27 L. J. C. P. 305, which

at that time, when the syndicat intended to appeal to the Supreme Court, the bank could have forced on the execution of the judgment which they had obtained, and their execution would not have been stayed except upon the terms of the deposit of the money in Court. Lewin at p. 473 says: "It is incumbent upon the trustee to satisfy himself beyond doubt, before he parts with the possession of property, who are the parties legally and equitably entitled to it; he must attend to all claims of which he has notice." The bank, it seems to me, owed no duty to the syndicat whatever after they refused to take the reference, and in any case their first duty was to the pledgor of the securities, who was their cestui que trust. I would also refer to Lewin upon the question of charging a trustee interest, at p. 472, and upon the question of a trustee acting under advice of counsel, I would refer to Lewin, p. 853.

The question of the judgment obtained by the bank against Barrette, which was afterwards set aside by my order, was raised. I cannot see how that question can be raised now upon this trial. It should have been disposed of by an appeal against my order. The order stands, and the judgment against Barrette is set aside. Upon this question I refer to vol. 7 of the Encyclopædia of the Laws of England, p. 116; Huddersfield Banking Co. v. Lister, 64 L. J. Ch. 524; Ainsworth v. Wilding, 65 L. J. Ch. 432; and Hickman v. Berens, 64 L. J. Ch. 785. I am still of the opinion that I was justified in setting aside that judgment.

It was argued that the plaintiff cannot recover because there was no tender of a re-conveyance made to the bank. This, however, will be only a question of costs in any case, and that only where laches was shewn. I cannot see that any laches was shewn, as the action was brought to trial as speedily as it could be, and it would have been useless to have gone on with the trial in this present action while the former one was pending before the Supreme Court and Privy Council, because it depended upon the result of those appeals whether any surplus would be coming to Barrette or not from the bank.

The question of trusteeship I would refer to in another case of Wilds v. Gresham, 5 De G. M. & G. 770, and this particularly upon the question of compromise.

It is argued on behalf of the bank that under the hypothecation agreement they are authorized to accept com-

promises. The words of the document are "accept compositions and otherwise deal with the customer and other parties and securities as the bank may see fit." Does this mean that the bank may sacrifice collateral securities without reason and without excuse? There is no excuse offered in the pleadings. There is no reliance placed upon the document in question to justify the act of the bank. They do not either by their pleadings or their evidence justify their dealing with the security upon the ground of trusteeship, that is, that they acted fairly and honestly and providently, and if the pleas had been properly raised, I do not think that upon the whole evidence I could hold that the bank have acted fairly or providently as trustees. And upon the question of their legal right to accept compositions, I do not think the document was ever intended in the first place for the purpose for which it is now sought to be used. If the words "accept compositions" mean anything, they mean, it seems to me, the right which the bank would have to take compositions from insolvents or to accept a composition which might be all they could recover upon the liquidation of the debtor's estate. I can easily understand that the holder of collateral security might act in the interests of the pledgee by accepting a composition, when that was the best which he could do both for himself and for the pledgor; but there is a total want of any evidence that the bank assumed that position when they made the settlement with the syndicate. They simply secured their own debt; that was their attitude sworn to by the manager. They did not care what became of the balance. They say they paid no regard to Barrette whatever, never thought of him at the time of the settlement. How then can it possibly be said that they exercised any discretion as trustees or exercised any forethought or consideration at all, such as a trustee is bound to exercise towards his cestui que trust. The head-note to Wilds v. Gresham, which I have cited, is: "Trustees of a bond debt, on the bankruptcy of the obligor, concurred with his other creditors in consenting to the fiat being annulled on the payment of a composition. On the transaction being impeached some years afterwards by cestuis que trust, who were under disabilities: Held, affirming the decision of the Vice-Chancellor (Kindersley). that the trustees were liable to make good the full amount of the debt; it being impossible to shew that the bankrupt would have obtained his certificate, or that the debt might

not have been recovered in full." And as to the strict meaning of the word "composition," I would refer to the case of The Queen v. Barlow, 56 L. J. M. C. 33.

Upon this branch of the case I think the plaintiff must succeed. I think the law is clear as to the position of a trustee holding collateral security. He must account to the pledgor for that security when his debt is satisfied. Whether that debt is satisfied or not is a matter of accounting in this matter.

Here I may as well decide upon the question of two items of the solicitors' bills which are charged against Barrette by debit slips. I cannot see any authority for charging those against Barrette, and in an accounting they will be disallowed. The bank have not justified their dealing with the securities either under their hypothecation agreement or under their position as trustees.

In addition to the contentions raised in this case upon this point as to the dealing with the collateral, there is also the question which I must consider in the taking of the accounts, that is, the question of interest. This matter has been fully discussed already in Benallack v. Bank of British North America, which was decided by this Court before the Western Law Reporter was published, and is therefore not reported. It was also considered again in the case of McDonald v. Canadian Bank of Commerce, where I prepared a written judgment ready for delivery, but the case was settled between the parties before delivery of judgment.* For these reasons I think it well that I should repeat the argument used in those cases, to some extent at all events. The Bank Act I take to contain all the body of law affecting the question of interest, and the penalties for usury so far as they can be applied to banking institutions, and by that Act, and that Act alone, this case must be determined. I can only repeat the argument advanced by me in the case of Benallack v. Bank of British North America. The course of decisions in Ontario upon this matter has been somewhat conflicting, and it is contended that all the decisions so far in that province have been confined to adjudication between private individuals, and had no reference to the Bank Act or to the law under it. I do

*** See Canadian Bank of Commerce v. McDonald (Y.T.), 3 W. L. R. 90, per Macaulay, J.; and Sparling v. Cunningham (Y.T.), 4 W. L. R. 336, also per Macaulay, J.**

not think that is a correct statement of the law. The early case of Barnhart v. Robertson, 6 O. S. 542, held that the plaintiff, who was voluntarily paid more than the legal rate, could maintain an action to recover the excess; but in Hutton v. Federal Bank, 9 P. R. 568, where the rate was 9 per cent., it was held that "overcharges beyond the lawful rate of interest, if paid, cannot be recovered back, or applied in reduction of a debt claimed to be due." That is the final clause in the judgment. Then we have the case of Jarvis v. Clark, 10 C. P. 480, in which it was held that money paid in excess of 6 per cent. interest upon a contract, not void by Act of Parliament, for the payment of such interest, cannot be recovered back. The judgment was given by Draper, C.J., who said: "We have already held in this Court that if money be paid as interest according to the terms of a contract, not void by Act of Parliament, exceeding 6 per cent. per annum, it is not recoverable back." I also refer to Quinlan v. Gordon, 20 Gr., Appendix 1. This was a case where a mortgage was created on real estate to secure a certain sum with interest, which, according to law, meant 6 per cent. per annum. The mortgagor, it appeared, agreed to pay additional interest for further forbearance each year, and gave promissory notes for the amount of such additional interest, which notes were duly paid. Subsequently the mortgagee instituted proceedings in Chancery to enforce payment of the mortgage debt and interest, and, in taking the account of what was due, the Court gave credit to the mortgagor for the amount paid on these promissory notes as against the principal and 6 per cent. interest. Thereupon the mortgagee appealed, and it was held, reversing the judgment of the Court below, that the mortgagor was not entitled to credit for the amount so paid, and that, although the Act then in force, 16 Vict. ch. 80, allowed persons to lend money at any rate of interest that might be agreed upon, still, in the event of their subsequently having to sue to enforce their securities, they could not recover more than the sum actually advanced and 6 per cent. Sir J. B. Robinson, C.J., gave a very elaborate judgment, and his judgment is worth reading, for this reason, that he regards the Act under which the contention was framed as one affecting public policy, and an argument which would have force in that respect regarding the Bank Act would have equal force regarding any other Act affecting interest as between private individuals; so that the

force of the argument respecting public policy is much weakened by a consideration of this case: see p. 8 of his judgment. And at p. 9 he says. "Still it is quite true, as observed in the Chancellor's judgment, that the legislature did not intend to exclude by this Act all protection from the borrower; they provided him this protection that, whatever rate of interest he might engage to pay, no contract to pay interest should be enforced against him to a greater extent than the 6 per cent. by the year." At p. 10: "I think it is plain, upon the whole statute, that the intention was to go further, and to permit the payment of any rate of interest that the parties might agree upon, and to divest such payment of the charge of illegality, in the absence of fraud such as would, upon general principles, invalidate a contract in law or equity. I do not see upon what principle an excess of interest, voluntarily paid, under a contract made since this statute passed, can be restrained." At p. 11: "The statute 24 Geo. II., it is true, does not say, in so many words, that the contract to pay for liquors so sold shall be void; while the third clause of the statute which we are now considering, does make the contract void for the excess; but there is no substantial difference. Both contracts are void in this sense, that they could not be enforced just as a contract, not in writing, to pay the debt of another is void without a consideration." . . . The case of Royal Canadian Bank v. Shaw, 21 C. P. 455, is also in point on this view of the case. See also Commercial Bank v. Cotton, 17 C. P. 447.

This is the result of the Ontario decisions, I take it, that money paid voluntarily, under these conditions, cannot be recovered back.

The Quebec authorities are conflicting. In Nye v. Malo, which case I have not had an opportunity of reading, the reports not being in our library, the matter is considered. Neither have I been able to get the case of Massere v. Dansereau; but in Maclaren on Banks and Banking the cases are digested, it appears. In Nye v. Malo, 7 L. C. R. 405, it was held in appeal that under the law of 1853, abolishing the penalties for usury, the maker of a promissory note whereon interest at a higher rate than that allowed by law had been retained or paid, was entitled to have the excess deducted from the principal. In Massere v. Dansereau, 10 L. C. J. 179, the Court of Appeal, by 3 Judges to 2, reversed the decision of the Court below, and decided that money

paid voluntarily in excess of the legal rate could not be recovered back. The question was raised in another case which went from Lower Canada to the Privy Council, Kierzkowski v. Dorion, 5 Moo. P. C. 397; but the case was decided on another ground. That Court said, however: "But an action to recover such excess could not properly be called a civil proceeding for usury. The whole effect of the Act is that a usurious contract shall no longer subject a party to penalty or forfeiture, but it shall be invalid so far as it stipulates for more than 6 per cent." The whole of the authorities were reviewed first in the case of Banque de St. Hyacinthe v. Sarrazin, Q. R. 2 S. C. 96, and it was there held that this section of the Act prohibiting the bank from taking more than 7 per cent. was a matter of public order, and that the defendant was entitled to credit for the sum which the bank had from time to time taken in the course of business over and above the legal rate. In this case I must say I was very much impressed by the argument of the learned trial Judge, Pagnuelo, J., who says: "This law is of public order; hence any such payment which might be made is null, and, by reason of motives of public order, he who has paid must needs have the right to recover, otherwise the nullity would become illusory; hence it would be sufficient for a creditor to obtain payment of such interest in advance in order to escape falling under the prohibition." This is true more particularly of loans of money on notes, as there the custom is to exact the payment of the interest in advance. Certainly the weight of authority in the province of Ontario is against his view, and the weight of authority in his own province is against his view, if we take a decision of the Court of Appeal and give it the effect which we ought to give it. I certainly fail to see how the policy of the law could be made effective if a voluntary payment such as this is not within the mischief of the Act, and what protection is afforded to a public dealing with a bank, if the simple payment of the interest gets rid of the effect of the enactment? As said by that learned Judge in the case of St. Hyacinthe v. Sarrazin, "These payments are usually made in advance." If not made in advance, there are very many devices by which the bank could defeat the object of the Act; taking them in advance is one; taking cheques against general account is another; taking cheques against the proceeds of a discount is another; and I have no doubt there are other sources open to the ingenuity of bank

managers by which the object of the Act could be evaded. But, in spite of my own views, I must hold to the weight of authority and decide that interest paid voluntarily is not recoverable back. Laws which provide that debts incurred for liquor sold by innkeepers cannot be recovered, are laws affected by policy, and yet if the money is voluntarily paid at the time of the purchase of the liquor over the bar, it certainly cannot be recovered back, and it has been so held. See Dawson v. Remnant, 6 Esp. 2. It is urged in this connection that the payment here was not voluntary. I have already said that Barrette was fully aware of the rate of interest he was paying. He would never have raised the contention or asked for re-payment but for the present attitude of the bank in this matter. He knew that his notes were being discounted at a certain rate, and that when renewal notes were given the interest was embodied in them, and that he was being charged that rate in the renewal notes. Cheques from time to time were given to retire notes which covered not only the principal but the interest, and he was well aware at the time of the amount which he was being charged. He signed releases in the ordinary form when he took up his cheques, and in the bank books there appear items of entry debiting him with interest, and he was well aware what these entries meant, and at no time was he in any doubt that the bank were charging him interest at the rates mentioned, and assented thereto, and knew when he signed the releases on taking up his cheques that he was debited with these interest sums. So that I think these payments of interest were voluntary.

The question for me to decide is how far the passing of the bank books establishes a stated account, and how far the accepting of such a stated account by Barrette constitutes a voluntary payment, especially when the pass-books are reinforced by the receipts or releases signed when the cheques were handed over. In this connection it must be noted that in the pass-book appear the entries for interest, and the evidence indicates that debit slips were passed out with the cheques as a voucher for the debit entry in the pass-book of interest, and upon these the releases were signed. One must consider the course of dealings of these parties. Barrette was perfectly aware that he was paying the various rates of interest charged to him; he knew that he could not obtain the accommodation from any bank or any person in the Territory

at a lower rate; he knew his pass-books were being passed every month. It is argued that the passing of the bank-book does not settle the account, nor does it establish the assent of the party to the charge. This might be argued with some force if it had been a single passing of a bank-book, and the acknowledgment of the cheques in the usual manner at the wicket, without a reading of the receipt, but when we find that the course of business has been in accordance with the same practice, that month after month Barrette passed the bank-books containing these entries, subsequently thereto giving cheques for interest and renewal notes, and subsequently thereto signing these releases, the notes given in renewal covering past interest, as Barrette knew, I cannot see how he can argue that he was not fully aware of the charges made, and did not assent to them as fully as if he had actually signed a cheque for interest alone or paid over the money for the extra interest charged. He must rely, it seems to me, entirely upon the interpretation of the Act and upon the law as he says it should be, that voluntary payments can be recovered back, because he cannot contend that these debits which he acknowledged and certified to, were not as voluntary as if he had paid then by actual money or cheque.

As to the passing of the bank-book the law is in a somewhat uncertain condition. Paget on the Law of Banking, at p. 115, collects the cases, and I need not burden this judgment with a consideration of them, but simply refer to that author. He leaves the matter in doubt, his own opinion, I think, being that the passing of the bank-book constitutes a settling of the account. He says that after full opportunity of examination on the part of the customer, all entries, at least to his debit, ought to be final and not liable to be subsequently re-opened, at any rate not to the detriment of the banker. I think the present case which I am considering is much stronger than any of the cases cited by Paget in this, that the item in question is one clear and distinct item of interest, the defendant being fully aware that he was paying it, fully aware of the entries and their purport, and he is not now, I take it, disputing the matter upon the ground that there was no settled account and voluntary acceptance of the charge, but he is disputing the account on the bald question of law, that, even if the payment is voluntary, it should be recoverable back. I take it that his entire ground is cut away from under his feet.

In so far as the bank have appropriated interest not so acnowledged and after the last passing of the bank-book, my opinion would be that they cannot recover interest in excess of 7 per cent. The bank cannot recover 12 per cent. unless the same has been voluntarily paid by the defendant, and it will be a question for the referee to determine how much interest was appropriated by the bank, if any, after the passing of the bank-book for the last time, and the signing of the last release. This date is clearly established by the evidence, and no difficulty need arise over it.

Upon the question of whether the bank shall be allowed 7 per cent. or 5 per cent., having charged 12 per cent. by the contract, I have already decided in the case of La France v. Bank of British North America that 7 per cent. should be allowed. Up to the time that I gave that judgment I could find no direct authorities to support me. Since then I have seen the case of Adams and Burns v. Bank of Montreal, 1 Commercial Law Reports 248. The judgment of Martin, J., at p. 250, in that case decides that 7 per cent. should be allowed, 10 per cent. having been charged upon the instrument sued upon. Since that time there has been a case of Bank of Montreal v. Hartman, before the same Judge, 2 W. L. R. 57, where the question arose on notes bearing interest at 12 per cent. The defendant raised sec. 80 of the Bank Act, and argued, as is argued in the present case, that a contract for 12 per cent. being illegal and void, there was then no contract for interest, and the parties could only recover the rate authorized by the general law, namely, 5 per cent. That learned Judge decided that the contract was not void, but that the bank could recover 7 per cent. There is also the unreported case of Bank of British North America v. Bossuyt, to the same effect, decided by Richards, J., of the Manitoba Bench.

My view of the matter was and still is that the Act did not avoid or make illegal the contract, owing to the illegal rate of interest being charged, but simply prohibited the bank from recovering a higher rate than 7 per cent.

I must say that I was very much impressed with the argument of the learned counsel upon this question, but I feel myself bound by the judgment of this Court en banc in the case of Benallack v. Bank of British North America. Should this case come up for further consideration before the Court en banc, I shall be glad then to consider the whole matter, because, as I have already stated in a former judgment and in this judgment, I have very grave doubts upon the ques-

tion. But I think the weight of decided authority so far in the other provinces and in this Territory is against the contention of the plaintiff upon the recovery of interest.

In the taking of the account the sums I have disallowed in regard to legal charges will be disallowed by the referee. He will treat the Barrette and Coleman account as a Barrette account, because I think the discount was made on Barrette's credit. He will take the account of what was due by Barrette to the bank at the date of the judgment of the Court en banc here, charging the bank with interest, at the rate of 5 per cent. from that date, on the balance, being the difference between Barrette's debt and the amount of the judgment recovered against the syndicat. Any other questions to be settled upon the order of reference I will hear argument upon again, if necessary, and the costs of the action will be paid by the defendant bank.

As to the syndicat and their position in the case, they were fully aware of all the circumstances and the relationship existing between Barrette and the bank; there can be no doubt about that; and I think they endeavoured to defeat Barrette by a secret arrangement with the bank behind Barrette's back. They took the same position as the bank all through, and refused any information. I think they were necessary parties under the authorities cited to me, and should pay their own costs. The plaintiff seeks no recovery against them in the action, but they were added simply as parties who were entitled to be and should be before the Court on the disposition of the matter. The recovery will be against the bank.

YUKON TERRITORY.

CRAIG, J. FEBRUARY 13TH, 1908.

TRIAL.

CAMERON v. SUTTLES.

Partnership—Placer Mining Operations—Evidence to Establish Partnership Agreement — Statute of Frauds—Refusal to Carry out Agreement—Damages.

The plaintiff and defendant were both miners, generally engaged in placer mining operations. The plaintiff alleged

that on or about 25th October, 1906, he entered into a partnership with the defendant to carry on placer mining on property belonging to the defendant at Dublin Gulch, some 200 miles from Dawson, and that about 9th February, 1907, the defendant refused to carry out the partnership any further; and the plaintiff claimed damages.

J. M. Carson, for plaintiff.

R. L. Ashbaugh and George Black, for defendant.

CRAIG, J.:—The plaintiff has twice amended his statement of claim, alleging by the first statement that the partnership was entered into on 10th December, by the second that it was entered into on 25th October, and also adding that one Reutzer S. Ames was taken into the partnership on 10th December, and setting out the specific and special damages claimed. The defendant answers denying the agreement and pleading that the agreement was only entered into in the alternative of another person named Wooliver not entering into it, and, further, that it was conditional upon the plaintiff putting up $400, which he failed to do; also pleading that the agreement, if any, was not to be performed within one year from the making thereof, and that the 4th section of the Statute of Frauds has not been complied with.

The plaintiff swears that he met the defendant, who represented to him that he had profitable ground to be worked by hydraulic methods on Dublin Gulch, and suggested that the plaintiff should enter into partnership with him. This was on or about 25th October. And the plaintiff says that there and then the partnership was formed, and they proceeded to make necessary inquiries regarding the purchase of goods and machinery and supplies required. Ames, who came into the partnership about 10th December, as is admitted by all parties, says that all the parties prepared lists of goods which they thought would be necessary to carry on the work, and that they together and individually went to different stores and inquired of merchants who carried on business near the property to be operated and in Dawson, as to prices, and checked their lists; that hydraulic hose was actually purchased, and other stuff. Ames paid over to the defendant Suttles $400, which Suttles used in buying goods from one French, and upon the exclusion of Ames and Cameron from partnership, or, in other words, upon Suttles going away and quitting the project, Ames brought an ac-

tion and recovered from Suttles for the money so advanced. Another witness swears he heard these men, Cameron and Suttles, discussing their partnership business in a cabin which they occupied. Suttles maintains that Cameron was not able to raise the money, but I don't believe this. The conclusion I come to, upon the evidence, is that Cameron was quite prepared at any time when the goods were settled upon and the place of purchase settled upon, to put up his share of the money. The contract was simple in terms, namely, that they should share expenses equally and share the profits equally, working on the placer ground of the defendant Suttles, extracting placer gold, which work would represent other ground—10 other claims—of the defendant, which was a consideration to him for bringing in the other partners, both being experienced miners, and Cameron, as disclosed by the evidence, being specially useful because he could cook and do blacksmith work.

Apart from the contest of fact, there are raised certain legal questions: first, that the contract, being for two years, should have been evidenced in writing. It is certain upon the evidence that the contract was to last for two years. Also that it being an agreement affecting land, it should also be in writing, but this last plea is not specifically raised. The 4th section of the Statute of Frauds is relied on as to the contract not to be performed within a year.

Upon the first point, as to the partnership being for a period of longer than one year, I think that the part performance takes the case out of the statute. The nature of the operations which the men intended to engage in required just such preliminary work as they did before starting out on the project, and all that they did up to the time that Suttles abandoned the project was work which partners as partners should have done. Therefore, I think that the partnership was actually formed at some time before Suttles abandoned. If that is so, then no writing is necessary, and the part performance saves the contract. Upon this point I would refer to Lindley, Bl. ed., p. 84: "Persons who agree to become partners may be partners although they contemplate signing a formal partnership deed and never sign it; but, if they are not to be partners until they sign formal articles of partnership, and if they do not so act as to waive the performance of such condition, they will not be partners until it has been performed. Where, however, two persons agreed to become partners from a subsequent day upon certain terms

to be embodied in a deed to be executed upon that day, it was held that the partnership began on the day mentioned although the deed was not executed until afterwards." In this case there was some talk of a formal document being drawn up, but it was never done. Again, at p. 547: "If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages . . . excepting in the cases to be presently noticed, for specific performance." Also 22 Am. & Eng. Encyc. of Law, pp. 67 and 68: "Where the agreement for the partnership is for a longer term than one year, such contract, to be binding, should be evidenced by writing. If, however, the parties have acted upon the agreement and launched the partnership, they are held to be partners, though of course the provision of the oral contract that the firm shall continue for more than a year is not binding, and the firm may be dissolved at any time." And at pp. 205 and 206: "The great weight of authorities, however, seems to be to the effect that there is no such thing as indissoluble partnership, that, even where the partners have contracted for a definite term, any partner may of his own will dissolve the partnership with or without cause at any time. Of course, if a partner dissolves the partnership before the expiration of the agreed term, he will be liable in damages to his co-partner for a breach of contract, unless he has a valid legal excuse for not performing his contract." Addison on Contracts, 11th ed., p. 1169, speaking of partnership agreements: "But if, with a full knowledge of the terms of the partnership remaining unfulfilled and of the conditions on which the partnership was to be performed being accomplished, he does acts amounting to an assent to the carrying on of the concern in its incomplete state, such acts amount to a waiver of the conditions, and he becomes a partner in an actually existing partnership, and a partnership may commence at once, although a deed of co-partnership or of settlement has to be executed and other things remain to be done at some subsequent period." And further on: "As a general rule, the Court will not decree specific performance of a contract for partnership, whether for an indefinite or a specified period; but, if a partnership has commenced, the Court will carry into effect the articles of partnership." Also Grant v. Creelman, Thompson's Nova Scotia Law Reports (1856-59): "Where three partners enter into a contract to perform certain work as partners, and two of them, after the work has

commenced, exclude the third from all participation in it, the partner so excluded may sustain an action against them for such exclusion while the work is still in progress. The measure of the damages in such case will be the profits that may reasonably be expected to result from the undertaking."

As I have already said, I conclude from the evidence that it was an existing partnership, not an agreement to form a partnership for a period of two years, but that the men were actually partners. As to the time when the partnership started there is some doubt. There is no doubt that all 3 of them met, that is, Ames, Suttles, and Cameron, and discussed ways and means. Suttles took Ames's money and invested it in goods for carrying on the project, and I do not believe the evidence of the witness who says that he incidentally saw Cameron drop into an hotel and say to Suttles, "I can't make the raise." I am inclined to think from the evidence that Suttles himself could not raise the money. The manner of his dealing with these parties convinces me that he was not acting in good faith. It is in evidence, and I am inclined to believe it, that he was wasting his time about the city and keeping these men on for some ulterior purpose of his own. As a matter of fact, it was proven that he had the very ground he was proposing to work under option to one Thompson at the time. Upon the facts I am against the defendant.

Upon the question of damages it is urged that part performance can only give the right to specific performance, not to an action at law for damages. But I think the authorities are to the contrary effect. Sedgwick on Damages, vol. 2, p. 251, under the heading "Preparations to Perform," says: "As we shall presently see, the general rule is that the plaintiff recovers the sum total of the benefits or gains of a contract, less the expenses; hence, he cannot recover for the expenses of preparations to commence performance of the contract, for he would equally have incurred those expenses if the defendant had performed his part. Where, however, the rule that the plaintiff shall recover the profits he would have made by the contract does not apply, as where they are uncertain, he is allowed to recover the expenses incurred by him in his preparations to perform. But where an action was brought for the breach of an agreement to form a partnership, and it was proved that the plaintiff had given up an East India voyage, as was well known to the defendant, he was allowed to shew the value of the voyage, not as special

damage, but as an ingredient in estimating the value which each of the parties set on the contract in dispute."

Another objection raised by the defendant is that this is a contract relating to an interest in land, and therefore should be evidenced by writing. On this point I would refer to Leake on Contracts, 3rd ed., p. 216: "A contract of partnership is not brought within the statute merely by reason that the object of the partnership involves the possession and use of land, though in the result it may confer an interest in the real assets acquired under it. But a contract for a partnership in a mine belonging to one of the contracting parties which would give the other party an interest in the mine, was held to be within the statute." The last dictum is supported by Caddick v. Skidmore, 2 DeG. & J. 52. That case was a contract for partnership in a coal mine, the agreement being between the lessee of the mine and one B., becoming partners in the mine, paying the reserved rent, and subletting the mine at royalty and dividing the profits. This contract was held to be within the statute and not sufficiently proved by a receipt signed by the lessee given to B. for a share of the rent.

In the first place, I do not think that the contract which these parties made was one which would give to either Cameron or Ames any interest in a mine. It was a working partnership, Suttles being the locatee under the Placer Mining Regulations of this placer property. It was no more than what is known in this country as a lay agreement, which is really a partnership to extract the pay gold, and this partnership, as I have already said, was actually formed and in operation, and the fact that it involved the possession of land does not necessarily mean that it gave to the parties any vested or other interest in the land which required to be evidenced in writing.

Another objection is taken that the plea of the Statute of Frauds being raised, the plaintiff has not properly replied by confession and avoidance, as he should have done. This, I think, would be a good argument were it not for the fact that the statement of claim raises the facts which should have been raised (if not previously averred) in his reply by way of confession and avoidance. All the facts which he relies upon are raised in the statement of claim either as originally framed or as amended, and I may say now that I allow the amendment because all the facts were given in evidence covered by it. Therefore, I do not think that the rule

regarding the plea of confession and avoidance applies to this case, there being no surprise and all the facts being pleaded.

As to the time when the contract of partnership started there is some doubt; but beyond any doubt it started as early as 10th December, and if it did not start before that time any work which the plaintiff Cameron did prior to that time should not be charged against the defendant Suttles. The actual date prior to 10th December I am not quite certain about from the evidence, but beyond any doubt I am safe in saying that damages should at least be calculated from 10th December until 9th February. I think that Cameron was held here and wasted his time occupying himself in partnership operations preparatory to the carrying out of the scheme, for 60 days at least. I think there is sufficient authority to warrant me in allowing damages for such a breach of contract. It would be impossible to calculate what the profits would be on a venture of this kind, all depending on the nature of the ground and the richness of the deposits. It is a purely speculative venture; but that does not justify Suttles in breaking it off in the manner in which he did, and I think he is liable to pay damages for the 60 days, computed at $6 per day, and there will therefore be a verdict for $360 and costs.

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YUKON TERRITORY.

CRAIG, J. FEBRUARY 22ND, 1908.

TRIAL.

DUGGAN v. CORBETT.

Miners' Liens—Wages—Claims under Miners Lien Ordinance for Work done for Layman—Defence by Owner of Mining Lands — Acceptance by Miners of Layman's Cheques—Payment — Delay in Presentment—Laches—Waiver—Practice — Enforcement of Liens—Originating Summons—Certificate of Commencement of Proceedings —Time—Signature of Clerk of Court.

Claims by plaintiffs Michael Duggan and Robert Johnston, under the Miners Lien Ordinance, for wages due by defendant Thomas Corbett, layman on bench placer mining claim, 4th tier, lower half, right limit, opposite creek claim No. 255 below lower discovery claim on Dominion Creek, in the Yukon Territory, between creek and hill, and known as Harris Bench; also bench, 5th tier opposite right limit, No. 255 below lower discovery on Dominion Creek aforesaid, bounded towards stream by Harris Bench and known as Icke Bench, for work done on these mining claims by the plaintiffs for the defendant Corbett as layman, the defendant Newbaumer being owner.

R. L. Ashbaugh, for plaintiffs.

Defendant Corbett appeared in person, but did not defend.

J. M. Carson, for defendant Newbaumer.

CRAIG, J.:—The plaintiffs, the labourers, in this action are mining men working on placer mining claims, and there seems to be no dispute as to the amount of work done and the hours charged for, nor the rate, nor as to the fact that the work was done on placer mining claims, and was such work as would entitle the workmen to a lien on the claims, subject to the objections raised by the owner.

From the evidence it appears that the layman gave certain cheques on his bank account in Dawson for the work done by the labourers. Some of these cheques were presented and cashed; others of them were not presented for some time, and when they were so presented there were no funds in the bank to meet them. Newbaumer, the owner, was on the claims during the whole time when the work was going on, and was careful to see that these cheques were given, being satisfied, when the cheques were given, that his ground would be freed from the labourers' lien. But there was no privity between him and the labourers. The agreement of lay was, of course, made by the owner Newbaumer with the defendant Corbett, who hired the men and was responsible entirely to them for their wages. At the close of the operations the entire output of gold dust, both the layman's share and the owner's, was put in together, and distributed as far as it would go in payment of the wages. The two labourers in question, the plaintiffs, delayed for a very considerable time in the presentation of their cheques. It is now contended that their laches disentitles them to recover; further, that having taken the cheque as payment, their right to the lien is waived.

Upon the hearing of this case Mr. Ashbaugh attempted to succeed upon the proof of the originating summons only and the affidavits supporting it, but I overruled that point and directed that viva voce evidence should be given, being of opinion that the originating summons was no more than a writ in an ordinary action starting a proceeding, and that he must prove his claim in open court.

Next, it is objected on the part of the owner that the certificate required by sec. 12 of our Miners Lien Ordinance had not been filed, Mr. Ashbaugh contending that, as the case was brought to trial before the expiry of the time fixed by that section, namely, 60 days, there was no need to register any certificate; that the action itself was the best certificate I overruled him on this point, and directed that the filing of a certificate was necessary under the Act; but, as the time

for filing a certificate had not expired, the trial was adjourned and he was allowed to file his certificate then and there, which was done before the expiry of the 60 days.

There are two main contentions in the action, one that the acceptance of the cheques and the holding of them for the time during which they did hold them is a waiver of the labourers' lien, and the other that the certificate, even although registered, by direction of the Court, after the day of trial, within the time, yet did not itself conform to the Act. The section in question reads as follows: "Every lien in respect of which a claim has been duly deposited under the provisions of this Ordinance, shall absolutely cease to exist upon the expiration of 60 days from the registration of such lien, unless in the meantime proceedings are instituted to realize the claim under the provisions of this Ordinance, and a certificate thereof (which may be granted by the Court in which or the Judge before whom the proceedings are instituted) is duly filed in the office of the Gold Commissioner." The lien is regular in form and properly registered. The originating summons was regularly taken out, and conforms to the rule requiring proceedings to be taken. The certificate which is registered under this section is one signed by the clerk of the Court, under the seal of the Court, and is a simple certificate that on 17th September proceedings were instituted in this matter by originating summons to realize the claims of lien filed by the plaintiffs on the said claims. It is contended that that certificate should be signed by direction of the Court or by the Judge issuing the summons; that that certificate is not a certificate of the Court or Judge; and that it is compulsory that it should be signed by the Court or Judge; and I am referred to a decision of my own in Levin v. Trump, in April, 1902. That case arose under the North-West Land Titles Act, and was raised by the registrar questioning whether he was compelled to accept a lis pendens for registration. It was argued in that case that the lis pendens was such a certificate of the Court of Judge as the registrar was bound to accept. The main question for discussion there was whether a lis pendens can be registered and is such a document as the registrar is bound to accept and register. By that Act there is provided in lieu of a lis pendens what is known as a caveat. In Levin v. Trump the caveat had expired by effluxion of time, and lis pendens was taken out and an attempt made to register it, but the registrar refused to accept it for registration. The

amending Act, sec. 4, amending sub-sec. 2 of sec. 33 of the original Land Titles Act, provides for the registration against lands of caveats, mechanics' liens, transfers by sheriff or by order of the Court or Judge, transfers on sale of land for taxes, or certificates or orders of the Court or Judge. It was contended that the last words, "certificates or orders of the Court or Judge," cover lis pendens. I held that they did not, that under that Act the caveat was the proper instrument, and that a certificate by way of lis pendens was not such a certificate as was contemplated by the Land Titles Act, and I considered somewhat fully the meaning of the words "certificate of a Court or Judge," holding that it must be a document directed by the Court or signed by the Judge, having for its object an intention to create some charge against or interest in the lands. It does not necessarily follow from that judgment that the certificate must be actually signed by any of the Judges of the Court, but such a certificate must be signed by the order of the Court.

In the present case I think the intention of the Act is an entirely different one. The Ordinance creates a lien as soon as the lien under sec. 7 is properly registered. That lien expires unless proceedings are taken under sec. 12 which I have cited above. The certificate mentioned in the Act is, in the first place, not a certificate starting the proceedings, but is only a certificate that proceedings have been started; it is a notice, and nothing more. That is the clear intention of the section. It notifies all intending purchasers or persons having any interest in the claim that the lien is in force, and that the party filing it is proceeding to enforce it. The registration of the lien and the issuing of the originating summons complete the entire proceeding necessary to entitle the lien-holders to proceed and realize their claims, and the certificate required is, as I said before, nothing more than a notice that they are so proceeding. Of course, unless that is filed, their lien ceases within 60 days and becomes vacated.

Then there is another distinction between this section and the one cited in Levin v. Trump—that the section provides for a certificate to be filed in the office of the Gold Commissioner. It will be observed that the words, "which may be granted by the Court in which or the Judge before whom the proceedings are instituted," are within brackets. The natural reading of that section would lead one to suppose

that this is an alternative, or, to put it perhaps less strongly, it may be said that it is possible that this may be an alternative mode of evidencing the certificate. Of course, one cannot imagine any other way in which a certificate could be issued but by the Judge who signs the originating summons or from the Court out of which it is issued. The words used in the Land Titles Act, it seems to me, apply to an original certificate, which is the first proceeding and the main proceeding relied upon to charge land under that section; for example, an order directing that land shall be charged with any trust on a trial. In the case of the Lien Ordinance it is no more than a notice. The originating summons is signed by the Judge; it is filed in the Court; it starts the proceedings; and the clerk of the Court in this case has certified, as the officer of the Court, that these proceedings are started. It seems to me that this is a complete compliance not only with the spirit of the Act but with the letter of it.

As to the other question of waiver by acceptance of the cheques, I do not see that the laches, if there is any, of the labourers in not presenting their cheques, affects their claims in any way. Under the authority of some cases decided in our own Court and particularly late cases in vol. 6 of the Western Law Reporter, namely, Munroe v. Cameron, p. 703, Drabeson v. Thompson, p. 587, and a case from Alberta, Swanson v. Mollison, p. 678, where most of the authorities are considered, I think I must conclude that the acceptance of a cheque or a promissory note is not a waiver of the lien unless accompanied by an express waiver. It is argued that this is a hardship upon Newbaumer, the owner, who was present and saw the cheques given, and supposed that his land was clear; but what could Newbaumer have done to better his position then? If the cheques had been refused by these men, what could Newbaumer have done to protect himself? By virtue of the work being done on a placer claim, the lien attached, and there was no reason why the men should not suppose that the cheques would be paid at any time when presented. They owed no duty to Newbaumer particularly, and they originated their lien proceedings within the time fixed by the statute. Newbaumer suffered no injury by their laches, even if they did owe any duty to him, because he could not have helped himself then in any way by taking any action open to him at that time. I need not repeat the authorities upon this question any more than I have done. I do not think the laches

of the plaintiffs affected Newbaumer, and there will therefore be judgment for the amount claimed, to be realized out of the claims by the ordinary process provided for by the Lien Ordinance, with the costs of the action.

MANITOBA.

DECEMBER 3RD, 1907.

COURT OF APPEAL.

CAMERON v. WINNIPEG ELECTRIC R. W. CO.

Trial—Order for trial by Jury—Jurisdiction of Referee in Chambers—Action for Negligence.

Appeal by defendants from order of DUBUC, C.J., dismissing their appeal from an order of the Referee in Chambers, made upon the application of the plaintiff, directing that the action, which was brought to recover damages for personal injuries received by the plaintiff by reason of the negligence of defendants, as alleged, should be tried by a jury.

The principal ground of appeal was that the Referee had no jurisdiction to make the order.

D. H. Laird, for the appellants. The application was made under sec. 59, sub-sec. (b), of the King's Bench Act: as to "Judge," see sec. 2 (o), and Rule 2. As to powers of Referee, Rule 27. "Now" refers to time of passing the King's Bench Act, 1895: Watson v. Dandy, 12 Man. L. R. 175. See sec. 7 of 3 Edw. VII. ch. 41, an Act respecting the R. S. M. 1902. The Referee had not the power at that time: Scott v. Thompson, 7 Man. L. R. 472: and therefore does not possess it now: Rule 27; Holmested & Langton, pp. 151, 152, 217. Rule 29 grants to the Referee the powers of a Judge in Chambers under the Rules, but Rule 442 does not include this power. This does not relate to the "conduct" of the action, but to the constitution of the tribunal: Oxford Dict., p. 790; Walker v. Robinson, 15 Man. L. R. 445; Tellier v. Schilemans, 16 Man. L. R. 430, 5 W. L. R. 261. The principle of strict construction applies: Maxwell, p. 441. As

to the merits, see Swyny v. North Eastern R. W. Co., 74 L. T. 88.

M. G. Macneil, for the plaintiff, was not called on.

THE COURT (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), dismissed the appeal.

MANITOBA.

FEBRUARY 17TH, 1908.

COURT OF APPEAL.

RE DUPUIS.

Municipal Corporations — By-law Regulating Buildings in Town—Distance of Stable from House—Application to Buildings in Existence — Nuisance — Conviction — Quashing.

Eli Dupuis was convicted of maintaining a stable within less than 20 feet of the house of Henri Chabot, in the town of St. Boniface, without the permission of Chabot, such stable being a nuisance under by-law 423 of the town of St. Boniface, which provides that no stable shall be built and maintained at less than 20 feet from any house without the permission of the owner of such house, and declares that all stables built and in use at the date of the passing of the by-law which do not conform to that standard are nuisances, and as such subject to abatement.

The evidence shewed that the house of Chabot was built in October, 1905; the stable in question was erected in April, 1906; and the by-law was passed 10th September, 1906.

A writ of certiorari was obtained on behalf of Dupuis from MATHERS, J., and a rule nisi to quash the conviction was granted by the Court of Appeal.

A. Dubuc, for Dupuis, moved to make the rule absolute, and contended that the by-law was not within the powers conferred by 5 & 6 Edw. VII. ch. 51, sec. 16, and was at all events bad in so far as it assumed to refer to buildings al-

ready in existence; and the conviction could be based only upon a retroactive operation.

H. W. H. Knott, for the informant and the town corporation, shewed cause.

THE COURT (HOWELL, C.J.A., RICHARDS and PHIPPEN, JJ.A.), made the rule absolute to quash the conviction.

MANITOBA.

DUBUC, C.J. FEBRUARY 24TH, 1908.

CHAMBERS.

LEIBROCK v. ADAMS.

Mechanics' Liens — Costs — "Actual Disbursements" — Counsel Fees.

Appeal by defendant from the taxation of plaintiff's costs by the taxing Master.

The action was to enforce a mechanic's lien for $162. Interlocutory judgment was signed against the defendant. Subsequently on motion final judgment was entered for the claim and costs, with a reference to the Master. On the taxation of the plaintiff's costs, defendant raised objection to an item of $4 charged as a counsel fee for revising the statement of claim and a counsel fee of $20 on the motion for final judgment. There was no evidence to shew that such counsel fees had been actually paid to any counsel as disbursements.

T. L. Hartley, for defendant.

M. G. Macneil, for plaintiff.

DUBUC, C.J.:—I hold that under Robock v. Peter, 13 Man. L. R. 146, and Cobban Manufacturing Co. v. Lake Simcoe Hotel Co., 5 O. L. R. 447, 2 O. W. R. 310, counsel fees in such an action as this should not be considered as actual disbursements.

Appeal allowed without costs.

MANITOBA.

FEBRUARY 28TH, 1908.

COURT OF APPEAL.

McLORG v. STANNING.

Foreign Judgment—Action on—Defence—Want of Jurisdiction in Foreign Court—Residence of Defendant—Judgment in Absentia.

County Court appeal.

The plaintiff brought this action on a judgment recovered by him against the defendant on 31st August, 1907, in the Supreme Court of the North-West Territories, in the judicial district of Eastern Assiniboia. Defendant set up that at the time of commencing the proceedings leading up to the judgment sued on he was not a resident within the jurisdiction of the Supreme Court of the North-West Territories, nor was he a subject or citizen of the North-West Territories, and was not amenable to its jurisdiction.

The evidence shewed that at the time the action was brought in the Supreme Court defendant resided in the city of Winnipeg, and the judgment was pronounced in absentia. The case was tried before MYERS, Co. C.J., who entered a judgment for the defendant, from which the plaintiff appealed.

A. B. Hudson, for plaintiff.

W. M. Crichton, for defendant, was not called on.

THE COURT (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), dismissed the appeal with costs.

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

PONTON v. CITY OF WINNIPEG

Assessment and Taxes—Tax Sale—City Corporation Becoming Purchaser—Agreement for Redemption—Resolution of Council—Specific Performance—Tender—Estoppel—Waiver of Forfeiture—Acts of Officers of Municipal Corporation—Notices—Court of Revision—Title—Real Property Act—Trust.

Appeal by plaintiff from judgment of MATHERS, J., 6 W. L. R. 730.

The appeal was heard by HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.

A. C. Galt and G. D. Minty, for plaintiff.

I. Campbell, K.C., and T. A. Hunt, for defendants.

HOWELL, C.J.A.:—The facts in this case are fully set out in the judgment of the trial Judge. The only writing which the plaintiff puts forward by which the defendant might be bound under the Statute of Frauds is the statement in the finance committee's report to the council, which statement was made an act of the city council by a resolution referring to it. For the moment let it be admitted that this statement is sufficient in form as a writing to satisfy the 4th section of the Statute of Frauds. It is not contended by the plaintiff that the city corporation signed this document in the only way that a municipal corporation may sign, that is, by its corporate seal duly affixed. Has this document then been signed by an agent duly authorized to sign a contract of sale? There is no pretence that any person was appointed an agent to bind the city by a contract of sale. The authorities hold that an agent to find a purchaser is not an agent authorized to sign a contract binding upon the vendor. The authorities, however, do hold that an agent to sell has authority to bind the vendor. The only way by which this resolution of the council can be held to be signed is that

the minutes of the meeting of the council were at the next session signed by the mayor and clerk, and, the next day after the resolution passed, the city clerk wrote to some of the civic officials notifying them that this resolution had been passed. There was no letter of any kind to the plaintiff, or to any one acting for him. It cannot be said that, because the mayor and clerk signed the minutes, they were thereby appointed agents to sell this land or to bind the city by a contract of sale; neither can it be argued for a moment that because the city clerk wrote the letter above mentioned he was authorized to bind the city in a contract of sale. I think it clear that there is no written memorandum signed by the defendants or their agent duly authorized to sign a contract within the Statute of Frauds.

The form of the report affirmed by resolution is as follows: "That all lots formerly owned by A. W. Ponton acquired by the city at tax sale be conveyed to the said Ponton on payment of all costs, interest, and taxes to date." From the authorities it seems to me clear that the note or memorandum required by the Statute of Frauds must in itself contain some statement which would shew that a contract of sale and purchase had been entered into. There is nothing in this resolution that I can see from which any contract of sale could be inferred. It is simply a conclusion arrived at by the council, that they were willing to convey, if Ponton made certain payments. It was simply a domestic arrangement and instructions to the officers of the corporation of a conclusion arrived at by the city council. I think this case comes within the principles laid down in Tracy v. North Vancouver, 34 S. C. R. 132, and I therefore conclude that the document itself is not evidence of a contract of sale.

Mr. Galt strongly argued that it was an acceptance of the letter of the plaintiff's solicitors to the city council written more than a year before. When that letter was written, the statute did not permit the act to be done which in the letter was asked for, and no amendment to the statute was ever made to carry out the terms of that letter. The city were simply permitted to sell the property without first offering it for sale at auction. I cannot in any way consider this resolution as an acceptance of the written offer. The resolution requires taxes to date; that would include the taxes for the year 1903, which the city assess and charge against their own property acquired at tax sale. The resolution

cannot be considered as an offer of the property to the plaintiff, accepted by him, so as to make a binding contract. If it were an offer, the acceptance must be prompt—a delay of 4 months would be fatal to it. However, this question need not be further considered, because, upon the ground that the resolution has not been signed, within the Statute of Frauds, there can be no binding contract to sell.

This contract is an unexecuted one, and therefore the various cases where under certain circumstances the seal is dispensed with where the contract is executed, need not be considered.

The plaintiff urges that this matter might be considered as an agreement to extend the time for redemption, and that the city corporation are estopped from denying the plaintiff's right to redeem, and that, therefore, it should be declared that the plaintiff still has a right to redeem the land as if the title had not been vested in the city. Up to the time that the city corporation acquired their certificate of title under the Land Titles Act, everything was regular, and the certificate of title had the effect of absolutely vesting this property in the city corporation, and the right of redemption was lost without any wrongful act or default or estoppel as against the city. Prior to the issue of the certificate of title the assessor had properly entered in the assessment roll this land as being owned by the plaintiff. In May the assessor finally certified to his roll and returned it to the city. In June or July the city had the roll confirmed by their Court of Revision. The roll so returned by the assessor and so confirmed by the Court of Revision shewed the plaintiff as the owner of the land in dispute, and in May the assessor notified the plaintiff that he was so assessed. In November the tax collector sent a statement to the plaintiff of the taxes, and demanded payment for that current year. On 31st October the plaintiff caused his solicitors to write the letter of that date by which it is shewn that he clearly knew he had lost his title to the land by the issue of the certificate of title. There is no pretence that the assessor and collector, when they did the acts above mentioned, had any notice of the title to this property being vested in the city. There is equally no pretence that the city council and the Court of Revision, when the roll was before them, had their attention directed in any way to these lands being assessed in the name of the plaintiff. The certificate of title was not issued to the

city because of any default in the payment of the taxes for the year in which the certificate was issued.

The matter is not at all similar to cases where a mortgage has been foreclosed, and where, after the foreclosure, a part of the consideration for which that mortgage was given has been demanded and repayment enforced. I do not see how the plaintiff has lost anything, or has been induced to change his position in any way, because of the acts done by the city council and by their officers subsequent to the certificate of title. If he has lost anything or been induced to change his position in any way, because of these acts being done, perhaps an action might lie against the city because of these wrongful acts, but I cannot see how that can change the title to this land which the city lawfully acquired. The statute fixes a way by which the city may acquire these lands, and it then fixes a method by which they can be disposed of, and the only way by which they can dispose of them is by sale, and a sale must, to my mind, involve the position of vendor and purchaser, and not an agreement by which the parties may be placed in their original position as if the title had not been vested in the city. The city, having lawfully acquired this property according to the statute, can only dispose of it by the way fixed by the statute, and they have not done so.

The appeal should be dismissed with costs.

RICHARDS, J.A.:—The only points which impressed me in the plaintiff's favour on the argument of this case were: firstly, the claim that the acts of the assessor and of the Court of Revision, in treating the property as the plaintiff's after the certificate of title had issued in the defendants' favour, were such admissions by the defendants of the plaintiff being still interested in the lands as would enable the plaintiff now to redeem; and, secondly, the plaintiff's claim that there was a valid contract by the city, for sale of the property to him.

As to the first ground, I am, on further consideration, satisfied that the acts relied on to shew the alleged right to redeem, are not such as the city can be liable for. They are merely acts of officials and others who, though appointed by the council and removable by them, were, in doing the acts relied on, merely exercising compulsory statutory duties, under statutes delegating to the municipality certain powers of government. The doing of such acts has been repeatedly

held to create no liability on the part of a city council or corporation.

The second question depends on whether the resolution adopted by the city council on 14th December, 1903, could bind the city. It is contended by the city that an agreement to sell to a person lands which the city had acquired at a tax sale, can only bind the city when entered into by by-law. In this case the city had purchased, at their own tax sale, and in the manner provided by the city charter, the plaintiff's lands within the city. This right of so purchasing is one which it is in the power of the council to exercise or not, as they may choose.

Section 406 of the city charter provides that, if land, when put up for sale for taxes, will not sell for the full amount of arrears of taxes and costs, the treasurer may sell for any sum he can realize.

Section 407 says that the city may, at such sale, bid up to the amount due upon the lands for arrears of taxes and costs, and may become the purchaser, the city so acting through the mayor or any member of the council duly authorized by the council so to bid.

It is plain, from the above, that the city are not bound to exercise this right of purchase in cases where the full amount of the taxes and costs are not bid by others. As a fact, however, it appears from the evidence that the city have purchased a very large number of lots in this way. The evidence of one of the then city solicitors shews that, in connection with this particular tax sale alone, at which the city purchased the plaintiff's lands, there remained unredeemed, at the time of their applying for Torrens title, over 160 parcels of land so purchased, including between 2,300 and 2,400 lots. If the city had left on their hands anything like this number at their other tax sales, then, even allowing for redemptions by owners during the progress of the city's applications for Torrens titles, the city would become, and no doubt have become, the owners of a very large number of pieces of land.

Section 409 provides that the city may, after lands so purchased by them at a sale for taxes have become vested in them, lease the same, or sell and convey them by deed under the seal of the city, and that the proceeds shall form part of the city's municipal funds, and that the city shall not be

compelled to account to the former owner of the land for any sum thus realized.

It will be observed that this section, 409, does not provide any method for entering into a contract to sell, but only the method by which the lands, when sold, are to be conveyed.

It was argued very strongly for the plaintiff that the municipality, after choosing to acquire lands in this way, should be held to be in the position, with regard to their subsequent dealings with the same, of a land-dealing private corporation. And it is urged that, in any case, it would be unreasonable to hold that, with regard to every one of the many sales of such lots which the city make, a by-law should be required, to bind the city. I have been much impressed with this argument, and have felt great hesitation in deciding not to follow it. If the question were without precedent, I do not think I should find much difficulty in concluding that, in spite of sec. 472 of the charter (which says that the powers of the council shall be exercised by by-law when not otherwise authorized or provided for), a resolution would, in the case of such a sale of land, be sufficient to bind the council. To require a by-law for every such sale would add greatly to the work of the council, and also greatly incumber the city's records, as well as cause much delay in carrying out sales.

The construction favoured by Mr. Justice Gwynne in Waterous Engine Co. v. Town of Palmerston, 21 S. C. R. at p. 576, that an enactment in words similar to those of sec. 472 should be held to be limited to those "'governing or legislative powers conferred upon the municipal councils by the Municipal Act itself," seems to me the true construction of such an enactment. But that judgment is the dissenting one in that case, and we are bound by the views expressed by the majority of the Judges, who held that the powers which are referred to in such an enactment as the above are not so limited. It may be that the Judges constituting that majority would not have so held in a case like the present; but their language, I think, is broad enough to govern this case. At any rate, while doubting very much whether it should apply to such a case as the present, I do not feel at liberty to hold the contrary.

If the contrary could be held, I should think that the resolution of 14th December, while it probably could not be

an acceptance of the offer contained in the plaintiff's solicitors' letter, might yet, in itself, be treated as an offer by the city to sell to the plaintiff. If it were a valid offer, I think the letter of the plaintiff's solicitors of 16th April, 1904, accepting "the proposition of the city under resolution dated the 14th December, 1903," would form a binding contract. It is with regret, however, that I feel bound to hold as above that Waterous Engine Co. v. Town of Palmerston is binding.

The appeal, I think, must be dismissed.

PERDUE, J.A.:—With much regret, I am forced to concur in dismissing this appeal. I was, at first, much impressed with Mr. Galt's argument. The city failed to issue the certificate of title on the expiration of the six months mentioned in the notice as the time within which the plaintiff should redeem, and they continued to assess the plaintiff and demand taxes from him. It was strongly urged that the city had, by assessing the plaintiff for the property and by demanding taxes from him after the issue of the certificate of title, estopped themselves from saying that the certificate absolutely cut out the plaintiff's right to redeem. Upon reflection, however, I cannot hold that the plaintiff's position was changed or materially affected by this conduct on the part of the city. It does not clearly appear to me that by reason of such conduct on the part of the city he did anything that he would not otherwise have done. I do not think the elements necessary to constitute an estoppel are present.

Mr. Galt further contended that the conduct of the defendant subsequent to the issue of the certificate of title had given the plaintiff a right to redeem.

The certificate under the Real Property Act was issued on 7th April, 1902. In May, 1902, an assessment notice was sent to the plaintiff as owner of the land. In June, 1902, the Court of Revision was held and the assessment confirmed, the plaintiff being still assessed as owner. The assessment then became, under sec. 350 of the charter, valid and binding on all parties concerned, notwithstanding any defect, error, or misstatement in it. In November of the same year a notice was sent to the plaintiff demanding the payment of the taxes for 1902.

It was contended on behalf of the plaintiff that the position of the city in regard to the plaintiff was similar to that

of a mortgagee as against his mortgagor. The city had a very complete lien upon the land for their taxes, which lien might be enforced by a sale of the land. It had also a personal claim against the owner which might be enforced by suit. It is contended that the city could have sued the plaintiff for the taxes of 1902, that he had been assessed for the land, that notice demanding the taxes had been sent to him, that the city were, therefore, in a position to obtain a judgment against him. This, it was urged, had the effect of opening up the title and giving him the right to redeem in the same manner as a foreclosure suit might, after final order, be opened up by procedings being taken by the mortgagee to enforce the covenant.

In the present case, however, I do not think that there was any intention upon the part of the city to open up the absolute title the city had acquired and to allow the plaintiff to redeem as the owner. The assessment of the land for the year 1902 to the plaintiff was evidently a mere oversight on the part of the officials, and there was no actual intention of exacting from the plaintiff payment of the taxes for that year. The title of the city was absolute under the statute, and I do not think that the mere errors of the city officials in assessing the plaintiff, and of the Court of Revision in confirming the assessment, can affect the absolute nature of the certificate of title.

It was also urged that the resolution of the city council passed on 11th December, 1903, allowing the plaintiff to redeem on payment of the amount against the land, was valid and binding upon the city. I would gladly hold the resolution to be binding on the city, if the authorities permitted me so to do. There was, however, no by-law of the city and no contract under seal.

The vast weight of authority is against holding the corporation responsible in such a case. I would refer to Town of Palmerston v. Waterous Engine Co., 21 S. C. R. 556; Young v. Leamington, 8 App. Cas. 523; Hunt v. Wimbledon Local Board, 4 C. P. D. 55; Silsby v. Dunnville, 8 A. R. 524; Leslie v. Township of Malahide, 10 O. W. R. 199.

I have examined the clauses of the charter shewing what is permitted to be done by resolution of the council, and have come to the conclusion that the matter in question is not one where the council could be bound by a simple resolution.

On 18th April, 1904, the city council for that year rescinded the resolution passed by their predecessors allowing Mr. Ponton to redeem his land. Three days afterwards they sold the land for $9,690, being more than 15 times the amount there was against it for arrears of taxes, compound interest upon these, and all expenses connected with the matter. In so doing they repudiated the arrangement entered into by their predecessors with the plaintiff and took advantage of the fact that there was only a resolution of the council embodying the arrangement. Under the circumstances, I would not, if I had been trying the case in the Court below, have allowed the city any costs of suit. This Court should not interfere with the trial Judge's discretion in that respect, but it can refuse costs in this Court, and I think it should do so.

I would, therefore, dismiss the appeal without costs.

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

SIMON v. SINCLAIR.

Promissory Note — Forged Indorsement — Action against Ostensible Indorser—Proof of Forgery—Estoppel by Conduct — Previous Action on Forged Indorsement Undefended—Representation of Genuineness of Indorsement.

Appeal by plaintiff from judgment of PERDUE, J.A., 6 W. L. R. 638.

The appeal was heard by HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.

C. P. Wilson and R. G. Affleck, for plaintiff.

C. P. Fullerton, for defendant Omand.

RICHARDS, J.A.:—In this case the evidence does not go so far as to justify interfering with the learned trial Judge's findings of fact. On his findings the facts are as follows:—

The plaintiff held a promissory note purporting to be indorsed by the defendant James Omand. The indorsement was forged. The plaintiff sued the parties to the note. Omand, who knew nothing of the note until sued, took the statement of claim to a solicitor. No defence was entered for him, and the plaintiff got judgment against him by default. That judgment was afterwards opened up, and Omand let in to defend the action. After getting that judgment, and before he knew of Omand's intention to apply to be allowed to defend the action, the plaintiff, as a separate transaction, took another note from the person from whom he had got the first one. The new note also purported to be indorsed by Omand, but that indorsement had been forged by whoever had forged the indorsement to the first note. This action is brought on the second note.

Omand did not know of the second note till sued upon it. The trial Judge's findings of fact being in favour of Omand, the only ground of appeal for consideration is the plaintiff's argument that Omand's letting judgment go by default on the first note justified the plaintiff in assuming that the second indorsement was genuine.

I cannot agree with the learned trial Judge that it is material whether Omand did or did not authorize his solicitor to refrain from defending the first action. If it were, I should find it difficult to hold that Omand did not intentionally refrain from entering a defence. Whether he did or did not intend to defend, the deduction, if any, that the plaintiff would have the right to draw from his not doing so, would, I think, be the same in either case.

It is alleged by the plaintiff that a duty was cast on Omand to tell the plaintiff that the first indorsement was forged, so that the plaintiff might be warned against other similar forgeries, but that, on the contrary, Omand has stood silent where it was his duty to speak.

The nearest case that I know of to the present one is Morris v. Bethell, L. R. 5 C. P. 47. There the defendant's brother had forged the defendant's signature to a bill of exchange, and the defendant, though knowing that the alleged signature was forged, paid the bill without disclosing

the fact of the forgery. Afterwards the brother forged the defendant's name to another bill and negotiated the instrument with the person who had held the first bill when it matured. It was held in an action on the second bill that there had been no duty upon the defendant to tell that the first one was forged.

I take the effect of that decision to be that the mere fact that a person learns that his name has been forged to a bill, does not, in itself, place on him a duty to tell of the forgery, in order to protect himself against liability in respect of subsequent possible forgeries, which he has no special reason to anticipate.

There is in that case an element that does not appear in this, and which, the plaintiff's counsel in this case argues, was the crux of that decision, namely, that the defendant, when he paid the first bill at the bank where it was payable, did not know who was its holder. But the judgments given do not appear to turn on that point. It is only mentioned as a circumstance in the case, and there is no further reference to it.

Morris v. Bethell has apparently not been dissented from, and I think the learned trial Judge in the present case rightly followed it.

The judgments in Mackenzie v. British Linen Co., 6 App. Cas. 82, seem to imply that if, as a result of the defendant's silence on learning of the first bill, the bank had altered their position to their prejudice, he would be liable on the second bill. But, in that case, the second bill was merely a part renewal of the first, and the negligence making the defendant liable, if there had been any, would, therefore, have arisen in the same transaction, which is not the case here.

In this case Omand did nothing. The act complained of was one of omission, not of commission. The utmost that can be suggested is that Omand was negligent in not assuming that there might be subsequent similar forgeries, and in not warning the plaintiff by telling him of the first one. If, therefore, there were any estoppel in this case, it would be one arising from negligence only. But it was held in Arnold v. Cheque Bank, 1 C. P. D. 578, that mere negligence, to amount to an estoppel, must occur in the transaction in question. It is so stated also in Everest & Strode on Estoppel, 2nd ed., p. 343.

There is no claim that, in the present case, there was any negligence with regard to the second note, the one now sued on.

For these reasons I would dismiss the appeal with costs.

In dealing with this case I have not in any way considered the question of any liability of Omand on the first note, and I wish it understood that I express no opinion as to it.

PHIPPEN, J.A.:—The facts found by the learned trial Judge are supported by the evidence, and cannot be questioned on this appeal.

The plaintiff, a money lender, in March, 1905, discounted for one Sinclair a note bearing the forged indorsement of the defendant. The defendant first had notice of the forgery some months after maturity, when an action was brought to enforce payment. Thereupon he consulted a solicitor, advising him that his signature had been forged and instructing a defence to be entered.

Through some inadvertence, and without the knowledge or intent of the defendant, this was not done, and judgment was signed on default. Later, while the defendant was unaware that the defence had not been entered, Sinclair negotiated the note now sued upon, which also bears defendant's forged indorsement.

Thereafter defendant became aware of the judgment, which, on motion, was vacated and defendant allowed in to defend. The plaintiff then learned of the forgeries, and the defendant was informed of the claim on the present note.

At the trial it appeared that plaintiff had, during several years preceding the present forgeries, discounted for Sinclair a series of notes bearing defendant's forged indorsement. Plaintiff would not state that in discounting the present note he relied on the judgment as admitting the genuineness of Omand's signature, although he did state that had defendant advised him promptly of the forgery, he would not have taken the note sued upon.

After reviewing the facts, the learned trial Judge finds: "I am, therefore, of opinion that the plaintiff was not led into taking the note sued on by any representation derived from the fact that no defence had been put in by Omand in

the first suit, and that judgment had accordingly been entered against him. No doubt, if a defence had been entered in the first suit, the plaintiff would have been put upon his guard."

In these circumstances, is the defendant estopped from denying his signature on the present note?

To my mind, the answer must depend on the finding of fact whether, having regard to his position in life, the defendant, from the facts within his knowledge, should reasonably have anticipated the subsequent forgery as a result of the course he followed. See Morris v. Bethell, L. R. 5 C. P. 47; Mackenzie v. British Linen Co., 6 App. Cas. 82; Ewing v. Dominion Bank, 35 S. C. R. 133; Ewart on Estoppel, p. 112.

I do not think the plaintiff has made out such a case. On the contrary, the defendant had notice only of an individual forgery. There was nothing to connect it with any series of contemplated frauds. When defendant first learned of the forgery, the note had been made the subject of a suit rendering it unlikely that the plaintiff would give further credit on similar paper. There was nothing in the defendant's name or position to make his signature of particular value for banking purposes. The defendant promptly placed the matter in the hands of a reputable solicitor for attention.

I fail to see how an humble and uneducated gardener could be expected to do more, or how such a person, upon the known facts, could reasonably contemplate that the plaintiff, under existing conditions, would discount further forgeries for Sinclair. The evidence discloses no fact imposing a duty on the defendant to anticipate and notify the plaintiff against the subsequent fraud. The appeal should be dismissed.

HOWELL, C.J.A.:—I concur in the judgments of my brother Judges. It perhaps might be urged that, because of there being no notice of the forgery of the first note, the plaintiff changed his position, and that, therefore; there was an estoppel as to the making of that note. The case for the recovery on that note being still pending, any statements of fact, or inferences, referred to in the judgments should be read in reference to liability on the second note only.

Appeal dismissed.

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

MORDEN WOOLLEN MILLS CO. v. HECKLES.

(AND FOUR OTHER ACTIONS).

Company — Shares—Allotment — Calls—Liability of Subscribers—Estoppel—Notice — Directors — Irregularities in Election—Unqualified Persons Elected and Acting—Quorum of Qualified Directors—Validity of Calls.

Appeals by plaintiffs from judgments of LOCKE, Co. C.J. at Morden, dismissing five actions to recover calls on stock held by the several defendants (Heckles, Ens, Garrett, Kennedy, and Reuter) in the plaintiff company.

The company were incorporated under the Manitoba Joint Stock Companies Act, by letters patent dated 14th March, 1904. Shortly thereafter and before the first call, the defendants each subscribed for certain shares.

On 23rd April, 1904, the provisional directors made a call of 20 per cent. on the subscribed capital, including that of the defendants. This call these defendants paid.

On 17th September, 1904, the provisional directors made a second call of 25 per cent., which was paid by the defendants, except Ens and Reuter.

The first annual shareholders' meeting was held on 9th January, 1905, when the by-laws of the company were approved and directors elected. On 7th January these directors allotted the stock as subscribed.

On 5th September, 1905, the directors made a third call, which none of the defendants paid.

The second annual shareholders' meeting was held 8th January, 1906. Directors were elected, 3 of whom were shareholders then in arrears for calls. Garrett was the only defendant who attended this meeting. He was one of the elected directors, and he afterwards attended directors' meetings and voted. On 28th September a fourth call was made, none of which had been paid by any of the defendants.

Actions were then brought against Ens and Reuter for the amount of the second and against all of the defendants for the third and fourth calls on their respective shares.

Disputing the second call, Ens and Reuter contended that the stock had not been allotted when the call was made. As to the third call the defendants contended that there was no evidence that notice of this call was given, and as to the last call they alleged that it was made by an unqualified board, and was therefore illegal.

The appeals were heard by RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. McLeod, for plaintiffs.

A. E. Hoskin, for defendants.

PERDUE, J.A.:—This action was brought by the plaintiff company against the defendants, who are shareholders in it, to recover the amount of calls upon stock. The company were incorporated under the Manitoba Joint Stock Companies Act in March, 1904. By the charter there were 8 incorporators, who became provisional directors. On 23rd April, 1904, a first call of 20 per cent. was made on the stock, and all the defendants paid this call. A second call of 25 per cent. was made on 17th September, 1904, and this call was paid by the defendants Heckels, Garrett, and Kennedy. On 9th January, 1905, the first annual meeting of the shareholders was held. A by-law had previously been passed by the provisional directors providing that there should be 9 directors. At the meeting of 9th January, 1905, 9 directors were elected. No ballot was taken, there being simply a motion that 9 shareholders should be directors, and this was agreed to without any opposition. Some of the shareholders who were present at the meeting were, it appears, in arrears at the time for calls upon their stock.

On 5th September, 1905, a third call of 20 per cent. was made by the board of directors which had been elected in the previous January. On 8th January, 1906, the second annual meeting of the company was held, and a second board of directors was elected. No ballot was taken at this latter meeting, there being no opposition to the names proposed, and the election being unanimous. This board on 28th September, 1906, made a fourth call of 20 per cent. on the stock.

A number of objections were taken to the regularity of the calls. It was objected that some of the shareholders who were present at the meeting were in arrear of calls and could not vote. As, however, there was no opposition to the directors proposed for election, I cannot see how this objection could prevail.

A further objection was that the directors were not elected by ballot, as required by the Act. I think, however, that this provision only applies where there is an actual election—that is to say, a contest. Where a complete board was nominated, as in the present case, and there was no opposition, there could be no necessity for a ballot, and it might in such a case be dispensed with.

It appears to me that the second and third calls were good. A prima facie case was made by the plaintiffs by producing a certificate under sec. 53 of the Act, under its seal, that each of the defendants was a shareholder, that the calls were made, and shewing the amount due thereon. There does not appear to have been any valid opposition to the election of the board of directors for 1905.

The only serious objection is in relation to the fourth call. The by-laws of the company provided for a board of 9 directors, of whom 5 should form a quorum. It appears that 3 of the directors who were elected in January, 1906, were at the time of their election in arrear as to the third call. By sec. 27 of the Act, no person shall be elected or appointed a director unless he is a shareholder owning stock absolutely in his own name and not in arrear in respect of any calls thereon. It was contended that if 3 of the directors were ineligible by reason of being in arrear in respect of calls upon their stock, there was not a complete board of 9 directors elected, and that consequently there was no power in the board to make a call.

One of the by-laws of the company provided "that in case of the death of a director, or of his being unable to act as such, or his ceasing to be a shareholder, or from any other unforeseen cause, there is a vacancy on the board, the vacancy thereby created may be filled for the unexpired portion of the term by the board of directors from among the qualified shareholders of the company." Such a by-law was regular under secs. 29 and 31 of the Act. I think the by-law covers a case like the present. There must have been a board of directors to carry on the company's affairs. If, by error

or oversight, one or more of the directors elected by the shareholders is not qualified to act, the remainder of the board, if forming a quorum of qualified directors, may carry on the affairs of the company, and may complete the board by themselves appointing directors to fill the vacancies. The election of directors for 1906 was not, therefore, a failure, as the defendants contend, by reason of some of the directors elected not being qualified. The 3 directors who were disqualified by reason of being in arrear in respect of calls appear to have remained on the board acting as directors without objection being taken. They were directors de facto. The fourth call was made at a meeting held on 28th September, 1906, at which there was present a quorum of 5 directors, all of whom appear to have been duly qualified and duly elected.

I think the fourth call was legally made. The board of directors elected in January, 1906, contained more than a quorum of duly qualified directors. The old board had gone out of office, and the new board had taken its place and had continued to carry on the affairs of the company. I think that a board of directors, some of whom are only directors de facto by reason of want of qualification, may carry on the affairs of the company, as long as there is a quorum of directors de jure.

In a case in the House of Lords the question was asked: "If authority be given by a statute for a majority of the vestrymen of a parish, or for 7 or more, to make a rate, would the rate, unobjectionable in other respects, be valid if made by 7 vestrymen, de facto, one of such vestrymen not being a vestryman de jure?" To this question the Judges returned an unanimous answer in the affirmative, holding that the vestryman de facto was competent to join in making the rate: Scadding v. Lorant, 3 H. L. C. 443, 446.

Bank of Liverpool v. Bigelow, 12 N. S. R. 236, was a case involving the legality of a call made upon the stock of a bank. Seven directors were required by law, of whom 3 formed a quorum. A call was made by 4 directors, of whom one was not legally a director. It was held that the call was good because 3 of the directors who made it were legally qualified.

The fact that vacancies in a board are not filled at once does not, in my opinion, affect the legality of the acts of the directors performed in good faith, and where the fact has not been brought to the attention of the board that such vacancies exist: Munster v. Cammell Co., 21 Ch. D. 183.

I think the appeal should be allowed with costs, to be borne equally by the several defendants. There should be judgment against the several defendants for the amounts claimed in each case, with costs in the County Court, including the ordinary counsel fee.

PHIPPEN, J.A.:—When the second call was made, Ens and Reuter had already paid one call in respect of this same stock, and they cannot now be heard to deny its allotment. Evidence of the first call, its payment, and acceptance and retention by the company, meets this objection.

The objection to the third call is not well taken. Section 53 of the Manitoba Joint Stock Companies Act, 1902, provides that "a certificate under the seal of the company suing for calls, and purporting to be signed by any officer of the company, to the effect that the defendant is a shareholder, that such call or calls have been made, and that so much is due by him and unpaid thereon, shall be received in all Courts as prima facie evidence to that effect."

Certificates under this section were filed at the trial. No objection was taken to their form, but defendants contend they do not evidence notice of call. If it is incumbent upon the plaintiff company to prove such notice, I think the certificates are sufficient. To my mind, they are prima facie evidence of the debt, including all those statutory proceedings by which such debts are created. There being no evidence to rebut this prima facie case, defendants' objection fails. These certificates also prove the allotment to Ens and Reuter, and could be relied upon by the company, if necessary, as meeting their objection to the second call.

As to the last objection, it does not lie in Garrett's mouth to question the qualification of the directors. He attended the meeting when they were elected, was himself chosen a director with them, and afterwards sat at the board and voted, and he cannot now be heard to object to the legality of the call because some of his co-directors were indebted to the company at the time of their election: York Tramways Co. v. Willows, 8 Q. B. D. 685.

There is no evidence that any of the other 4 defendants in any way recognized the directors, or acknowledged their position or qualification to office. With these defendants the only question is, are they bound by a call made by directors, 3 of whom are indebted to the company in respect of calls, at the time of their election?

Section 27 of the Manitoba Joint Stock Companies Act is as follows: "No person shall be elected or appointed a director unless he is a shareholder owning stock absolutely in his own right and not in arrear in respect of any call thereon."

At the time of their election the sole qualification of 3 of the directors was stock on which calls were in arrears, and these arrears are still unpaid.

Section 25 provides: "The affairs of every such company shall be managed by a board of not less than 3 nor more than 9 directors."

The law relating to de facto directors is not applicable. This is not the case of holding the company responsible to outsiders for acts of their apparent agents as in Re Bank of Syria, [1901] 1 Ch. 115. The statute provides how calls shall be made.

The obligation of a shareholder is to pay such calls upon his stock as are made, all necessary preceding formalities being complied with. A defective step in the creative proceedings, when the shareholder has not been estopped from setting it up, invalidates the call: Garden Gully United Quartz Mining Co. v. McLister, 1 App. Cas. 39.

By-law No. 7 is as follows. "That the affairs of the company shall be managed by a board of directors of 9, of whom 5 shall form a quorum."

At the annual shareholders' meeting held 8th January, 1906, 9 were elected, but of these 3 were disqualified, being in arrears for calls. Five directors, none of whom were disqualified as debtors, met on 28th September and made the fourth call. Did the election of the disqualified directors render the whole election void or was it a valid election of 6 directors?

It seems to me that the 3 disqualified directors should be treated as not elected. They could not and did not become directors de jure, and, in my view, only such could make a call. Yet I cannot say the election of the remaining 6 was voided, and that their election was a nullity.

By-law 7 does not say the board shall never be less than 9. It is contemplated by the Companies Act that less than the full board shall at times be empowered to act. By-law 14 provides that in the event of any director being unable to act, or if, for any other unforeseen cause, there is a vacancy on the board, such vacancy may be filled by the board of directors from amongst the shareholders. The

director unable to act is not necessarily a de jure director who becomes unable to act, but would, I think, include a disqualified person elected to the board. The by-laws, with the Act, apparently contemplate that under some circumstances less than a full board may conduct the affairs of the company. By-law 7 is, I think, directory. So long as there is a legally elected quorum, and that quorum acts, it is not illegal.

The appeals should be allowed.

RICHARDS, J.A., concurred.

MANITOBA.

FEBRUARY 29TH, 1908.

COURT OF APPEAL.

CLAYTON v. CANADIAN NORTHERN R. W. CO.

Railway—Animals Killed on Track—Defect in Gate—Knowledge—Escape of Animals from Adjoining Land—Liability of Railway Company—Railway Act, 1903, secs. 199, 237, 239, 294.

County Court appeal.

The plaintiff sued to recover $250 damages for two horses which were killed and a mule which was injured by an accident on defendants' line in December, 1905.

On the morning of the accident plaintiff's agent turned several of the plaintiff's horses loose in a field, from which there was, to the knowledge of both, free access to the public road through an opening in the fence left by the removal of a gate.

The horses passed through this opening and remained at large until some time in the succeeding night, when, having entered the defendants' right of way through a defective gate, they were injured by one of the defendants' trains.

The action was tried before RYAN, Co.C.J., and a jury. At the conclusion of the plaintiff's case counsel for the defendants moved for a nonsuit, on the ground that it ap-

peared from the plaintiff's own evidence that the animals were at large through the negligence of the plaintiff's agent. The County Court Judge refused the nonsuit, whereupon the jury found a general verdict for the plaintiff, omitting to answer several questions framed by the trial Judge, including one as to negligence of the plaintiff.

Against this verdict defendants appealed asking that it be set aside and a nonsuit entered, or that a new trial be granted.

The appeal was heard by HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.

O. H. Clark, K.C., for defendants.

J. S. Hough, K.C., for plaintiff.

PERDUE, J.A.:—The provisions of the Railway Act, 1903, apply to this case. By sec. 199 of that Act the railway company are compelled to erect and maintain fences on each side of the railway with swing gates in such fences, except in localities where the land on either side is not improved or settled. The locality in question was not one to which the exception applied. The consequences to the railway company where they have failed to comply with that provision and where animals at large get upon the railway and are killed or injured, are declared by sub-sec. 4 of sec. 237. The meaning of that sub-section has been determined by the Supreme Court of Canada in Carruthers v. Canadian Pacific R. W. Co., 39 S. C. R. 251. The sub-section, although differing somewhat in its wording from the corresponding provision in R. S. C. 1906 ch. 37, sec. 294, sub-sec. 4, refers to animals at large, whether upon the highway or not. It declares that the owner of any animal so killed or injured shall be entitled to recover the amount of his loss against the railway company, subject to exceptions which do not apply in the present case, unless the company establish that the animal got at large through the negligence or wilful act, or omission, of the owner.

The evidence adduced by the plaintiff clearly proves that the animals that were killed or injured got at large by reason of his negligence. The defendants are, therefore, not liable under sub-sec. 4 of sec. 237.

Section 294 of the Railway Act, 1903, provides that where the railway company do anything contrary to the provisions of the Act or omit to do anything required to be

done on the part of the company, the company are liable to any person injured thereby for the full amount of damages sustained by such act or omission. I do not think that this section applies to the present case. Section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured. The section provides the whole remedy to which the owner shall be entitled in such a case and the circumstances under which he can recover. Sub-section 3 of that section declares that where cattle at large contrary to the provisions of the section are killed or injured by a train at the intersection of a highway, the owner shall have no right of action against the railway company, and this notwithstanding that the company are bound by sec. 199 to maintain fences and cattle-guards. If, therefore, sec. 294 applies in every case of omission by the company to comply with the provisions of sec. 199 and gives a right of action to a person sustaining injury thereby, the owner of cattle at large near a crossing, contrary to the provisions of sec. 237, might maintain an action against the company if they had failed to safeguard the crossing as required by sec. 199, and this although sec. 237 expressly deprives him of any right of action in such a case. This would involve a direct conflict between two sections of the Act. The rights and liabilities of the railway company in respect of animals at large are declared by sec. 237, and no section of general application contained in the Act should add to or interfere with the specific provisions respecting that subject contained in the section specially framed to deal with it.

In reference to sec. 294, I would not desire to be understood as positively holding that a person may in any case recover under that section for injury done to his property.

I think the appeal should be allowed and a nonsuit entered.

PHIPPEN, J.A.:—Plaintiff contends that, under the authority of such cases as Bridges v. North London R. W. Co., L. R. 7 H. L. 213, Metropolitan R. W. Co. v. Wright, 11 App. Cas. 156, and Cox v. English, Scottish, and Australian Bank, [1905] A. C. 168, the verdict should not be disturbed by an appellate Court.

The liability of the defendants arises under sub-sec. 4 of sec. 237 of the Railway Act, 1903. That section is, in part, as follows: "When any cattle or other animals . . .

at large upon the highway or otherwise get upon the property of the company and are killed or injured by a train, the owner . . . shall be entitled to recover against the company . . unless the company establishes that such animals got at large through the negligence or wilful act or omission of the owner or his agent." This section has been interpreted in Carruthers v. Canadian Pacific R. W. Co., 39 S. C. R. 251, as having the meaning of the corresponding section (sub-sec. 4 of sec. 294) of the Railway Act, R. S. C. 1906.

Railway companies are not liable for all damages occasioned through defective fences. Animals injured while at large through the negligence or wilful act or omission of the owners are not protected. The Act imposes a duty on owners, in so far at least as they may seek its protection, neither negligently or wilfully to permit their animals to stray.

The onus of establishing such negligence is thrown upon the company. Once it appears that the injured animal got upon the railway through a defective fence, a statutory responsibility arises, unless the company can establish that the animal was at large through wilful intent, omission, or negligence.

The duty of the plaintiff, in so far as he claims the protection of the Railway Act, is neither wilfully nor negligently to allow his animals to be at large. According to his own testimony—testimony neither contradicted by witnesses nor limited by inference, testimony brought out by his own and not by opposing counsel—day after day he turned his animals loose in a field open to the road, he allowed them to roam the highway at will, he placed no watch or check upon them, the only restriction on their movements being their habits and inclinations. To quote the plaintiff's own language in part: "We did not attempt to keep the horses from going on the road. The horses were stabled at night and were allowed out during the day. Generally in the field, sometimes they went on the road, as the gates were down to avoid drifts of snow. The horses were turned out in the morning, and they could run." And as Harris, the servant man, says in cross-examination: "Horses require quite a lot of watching. I did not watch the horses that day. I did not look for them until night."

Under these admitted facts, the jury, ignoring the learned trial Judge's question as to whether the horses were

at large through the plaintiff's negligence, found a verdict against the railway company.

In Murray v. Canadian Pacific R. W. Co., ante 50, Mr. Chief Justice Wetmore held that horses leaving a field, fenced on three sides only, in which they had been placed by their owner, were at large through wilful omission.

In Becker v. Canadian Pacific R. W. Co., 7 Can. Ry. Cas. 29, Mr. Justice Harvey said as to animals somewhat similarly placed (p. 33): "But, even if it were not negligence, it was the wilful or deliberate act of the plaintiff in putting the animals where he did that was the cause of their getting at large, if indeed they were not at large in that pasture, and therefore they were at large through the negligence or wilful act or omission of the plaintiff."

Bourassa v. Canadian Pacific R. W. Co., 7 Can. Ry. Cas. 41, is to the same effect.

I agree with the conclusions arrived at in these cases. Where an animal, deliberately placed in a field with an open space to the highway, is left to its own inclinations, and chooses, as it may, without restraint, to walk abroad, it is, as a matter of law, quite as much at large through wilful act as if originally turned loose upon the road.

These facts being admitted by the plaintiff, the learned trial Judge should have entered a nonsuit. I have not discussed the question of liability under sec. 294, as it was not argued at Bar.

I would allow the appeal and order a nonsuit to be entered, with costs to the defendants both of the trial and of the appeal.

HOWELL, C.J.A. (dissenting):—From the evidence in this case and the findings of the jury it seems clear that the horses injured got upon the railway at a point along the defendants' line not at a highway intersection, but where by law the company were required to fence by sec. 199 of ch. 58, 3 Edw. VII. (the Railway Act, 1903), and that, because of this neglect of duty, the plaintiff suffered the damages found by the jury. Let us assume for this branch of the case that the defendants at the trial established that the animals were at large when they went through the place where the defendants ought to have had a fence and got at large through the neglect of the plaintiff.

These facts require a careful consideration of sec. 237 of the Railway Act, 1903. The first and second sub-sections deal with a question of law which would be solely within the powers of the provincial legislature, were it not that the acts restrained or legislated upon affect Dominion railways. These sub-sections, at first glance, appear to prohibit domestic animals from being at large on a highway within half a mile of a railway crossing, and provide for their being impounded "unless they are in charge of some competent person or persons to prevent their loitering or stopping on such highway at such intersection or straying upon the railway."

It seems to me that the last few words quoted mean, straying upon the railway from the point of intersection, and that the construction to be put upon these two sub-sections is, that if some person or persons guard the crossing sufficiently to prevent the animals from stopping or loitering there or from straying upon the railway from that point, the provisions of the Act are complied with as far as having a competent person in charge. The language of the first sub-section is rather vague. Animals in charge of a competent person, although merely driven in a herd on a highway, are not necessarily at large, as that term is ordinarily used in law, for, if the animals are on the highway in charge of a competent person, they are lawfully there (and peculiarly so under the conditions in this province), and are not "at large." It seems to me that the true meaning to be put upon these two sub-sections is that domestic animals are not to be upon the highway within half a mile of the intersection, unless some person is sufficiently in charge of them to prevent them loitering on the railway crossing, or straying from there on the railway, and that Parliament did not really intend thereby to legislate as to animals being "at large." Sub-section 3 provides that if the animals are killed "at such point of intersection," and if the provisions of sub-secs. 1 and 2, above commented on, are not complied with, no action lies against the company. This further provision shews that the sole object of the legislation was to protect the crossing and not to legislate as to animals being at large.

If subsequent amendment can explain the legislative intent in prior Acts, sub-sec. 5 of sec. 294 of the present Railway Act shews clearly that the 3 sub-sections commented on were merely intended to protect a crossing.

It is well at this point to look at the meaning of the words "at large" used in each of the four sub-sections of sec. 237. The term "running at large" has been judicially considered in Ibbottson v. Henry, 8 O. R. 625, and in McSloy v. Smith, 26 O. R. 508, 511. In the former case a lad of 15 was herding about 80 sheep on an unenclosed parcel of land, and it was held that the sheep were not running at large. In the latter case it was held that animals feeding in an enclosure were not running at large.

The terms "at large" and "running at large" are treated at considerable length in Words and Phrases Judicially Defined, vol. 1, p. 604, where a very large number of American cases are referred to; they hold that if there is a general control by voice, or by watching, or where one horse is accustomed to follow another and the former is controlled, or where the dam is being driven and the colt follows and is stampeded, or where a dog is playing with its master's child, or when domestic animals escape and are pursued, the animals are not at large or running at large within prohibitions of statutes. In 1890 there was an amendment to the Railway Act making the railway company liable where animals were running at large pursuant to a local by-law permitting it, and were injured. This is referred to and the authorities cited in Carruthers v. Canadian Pacific R. W. Co., 16 Man. L. R. at p. 327, 4 W. L. R. 441. In the revisions of the Railway Act since then that particular clause is not repeated. It is well known that the tendency of legislation is towards the creation of liability against railway companies where damage is caused by breach of their duties, and I would not expect to find in the present statute that the company are relieved from liability where animals, lawfully running at large, are killed because of a breach of duty of the company in keeping up a fence not at a crossing, and I look for the continuance of this liability in the very inclusive language of the statute.

Sub-section 4 of sec. 237 must now be considered. It declares, as explained in Carruthers v. Canadian Pacific R. W. Co., 39 S. C. R. 251, that where animals at large get on the railway and are killed, the company are liable, and it is no defence to shew that they were not in charge of a competent person, but the company have a good defence if they establish "that such animal got at large through the negligence or wilful act or omission of the owner."

Where the animals got at large without the negligence of the owner, this sub-section, as explained by the last mentioned case, creates a clear liability, and no other portion of the Act need be invoked.

Where, however, animals get at large because the owners have not kept up their fences or carefully kept their gates shut, and they wander to a railway, justified perhaps by a local by-law, and because the company have not performed a duty which the statute in clear terms imposes on them, and the cattle are killed, it seems strange if Parliament did not intend to create a liability.

Section 199 requires the railway company to fence and put up gates, and if, because of default in this duty, damages arise to an adjoining owner, they are liable, and in the case of Carruthers v. Canadian Pacific R. W. Co., 16 Man. L. R. 323, 4 W. L. R. 441, I held that, owing to the changes in the Railway Act, a new principle was established, and that the duty to fence was one which the company owed not alone to the adjoining owner but to the public generally. At the time of that decision the ill expressed language in sub-sec. 4 of sec. 237, "at large upon the highway or otherwise," had not been judicially explained, and commentators and lawyers differed as to its meaning. When the case went to appeal, the Supreme Court gave such a meaning to them that in that case the relief was clear under that sub-section. Liability under sec. 199 and my remarks as to the duty to the public thereunder were neither affirmed nor dissented from; to these views I still adhere.

Where a statutory duty is imposed and damages arise from a breach of that duty, the law implies a liability, as is shewn in the numerous cases collected in MacMurchy & Denison's Railway Cases, p. 350, but it seems to me the statute has directly legislated upon this point. Section 294 declares that if the company fail to comply with the requirements of the Act, they are liable to any person injured thereby for the full amount of damages sustained by such act or omission, and probably this was done to make the law clear on the point. This section was not cited or referred to on the argument, and at first glance it occurred to me that the words "person injured" referred solely to bodily injury, but on reflection I am satisfied that this narrow construction was not the intention of Parliament. This is the view also taken by a Divisional Court in Plester v.

Grand Trunk R. W. Co., 32 O. R. 55. If I am correct in this conclusion, then, by virtue of secs. 199 and 294, the plaintiffs are entitled to recover, unless the plain provisions of these sections are made nugatory by sub-sec. 4 of sec. 237.

To return again to the consideration of sub-sec. 4: is it to be said that this sub-section is a limitation of the liability to fence, and that where cattle may lawfully run at large pursuant to legislation which the province alone can enact, the company are not bound to fence in any way as against them? I should look closely at the Act before arriving at that conclusion.

Suppose the animals get at large within this sub-section without any default of the owners, the liability is complete under the sub-section, and the company have no defence, although they have fenced as required by the first two sub-sections of sec. 199. The company are given the defence of negligence of the owner, but they are liable under this sub-section, although their fences are sufficient under sec. 199, or although they are not required to fence under sub-sec. 3 of that section. It seems to me that the statute might be consistently read so as to give a meaning to both these sections by holding that if cattle get at large without the plaintiff's "negligence, wilful act, or omission," and are injured on the railway, not at a crossing, the company are liable, whether they have fenced under the first two sub-sections of sec. 199, or have not fenced under the third sub-section, and it is not unreasonable to think that it was considered just that if a railway company were not put to the expense of fencing in our prairie country to protect cattle from the dangers of their line, or if they fenced only as required by the Act, they should pay the damages where animals got out of control without the owner's fault. Consistently also it could be held that where animals were allowed to run at large, or were at large by the owner's neglect, he took the risk of their being injured where the company were not bound to fence under the third sub-section, and so the company would not be liable, nor would they be liable where they had fenced within the requirements of the two first sub-sections, and it would follow that where cattle were at large and were injured because of the breach of their duty to fence as required by these sub-sections, the company are liable; and that is my view of the true meaning of the Act.

I have not overlooked the case of Yeates v. Grand Trunk R. W. Co., 7 Can. Ry. Cas. 4. It seems clear that any remarks made in that case on this subject are purely obiter. The case of Becker v. Canadian Pacific R. W. Co., ib. 29, does not differ from my view of the law. There the fences were in good repair, and the plaintiff was negligent. The cases of McDaniel v. Canadian Pacific R. W. Co., ib. 34, and Bourassa v. Canadian Pacific R. W. Co., ib. 41, take a contrary view of the law, but, with great deference, it seems to me that the attention of the Judges was not called to the conflicting sections, and none of them considered sec. 294, nor was there an effort to harmonize the conflicts in the various sections.

It may be urged that to hold that under certain circumstances the company are liable for injury to cattle, although they had complied with the provisions as to fencing, is unreasonable, but I find a provision as to liability for fires in sec. 239 equally unreasonable, and it shews that Parliament intended that where a citizen, without default on his part, suffered damages because of the dangers incident to a railway, although the company had complied with all the requirements of the Railway Act, the company should make good the loss. The company are liable for loss by fire under sec. 239, no matter what care they take, and similarly liable under sec. 237, sub-sec. 4, for damages to cattle, although they have fully complied with sec. 199 as to fencing, if the plaintiff has not been negligent in allowing his cattle to get at large; but this leaves untouched the liability of the company for injury to cattle caused by their neglect in fencing, which neglect was the prime cause of the injury.

To put any other construction than this upon sec. 237 is, so far as the three prairie provinces are concerned, with their network of railways, a declaration that Parliament intended thereby to prevent cattle running at large and to interfere seriously with one of the great industries.

The appeal should be dismissed with costs.

Appeal allowed, HOWELL, C.J.A., dissenting.

MANITOBA.

MATHERS, J. MARCH 5TH, 1908.

TRIAL.

FISHER v. JUKES.

Partnership—Contract — Mortgage—Covenant—Dispute as to Application of Moneys—Accounts—Reference.

Action on a covenant in a mortgage deed executed by defendant, dated 8th September, 1896, for payment of $2,800.

C. P. Fullerton, for plaintiff.

A. C. Galt, for defendant.

MATHERS, J.:—The defendant denies that he is indebted to the plaintiff in any sum whatever. The defendant was the owner of certain patents for a ventilated closet and closet bowl, and on 19th March, 1894, he assigned, by a written agreement, an undivided one-half interest therein to the plaintiff, for $2,500. Prior to this date the defendant had been carrying on business as "The Manitoba Ventilated Closet Co.," and had therein incurred liabilities of about $5,000. He says that on the same day on which the above written agreement was executed, it was verbally agreed between the parties that they should, on their joint paper, borrow from some bank the sum of $5,000, $2,500 of which was to be used in paying the liabilities then existing of the company, and the balance of $2,500 to be used in prosecuting the business. The other half of the company's liabilities were to be paid by the $2,500 to be paid by the plaintiff under the written agreement.

The parties did apply to several banks for the necessary advance, but in each case the bank refused.

The plaintiff paid the $2,500 mentioned in the agreement, and in December, 1895, had advanced other moneys amounting to $617.19. The business was not successful, and about September, 1895, the defendant had practically given it up and had accepted a position with the Canadian Pacific Railway Land Department. There was still a large balance of the liabilities incurred by the defendant prior

to the agreement with the plaintiff. These creditors were pressing the defendant for payment. The plaintiff indorsed a note for $1,500 made by the defendant in the name of the company, which was discounted in the Merchants Bank. Out of the proceeds, the defendant paid the plaintiff $500 on account of the $617.19 before mentioned, and apparently applied the balance in part discharge of his old liabilities.

In September, 1896, the defendant executed the mortgage in question. The defendant admits the receipt of two sums under the mortgage, namely $600 and $500, which latter sum he paid to the Merchants Bank in reduction of the $1,500 note. The balance of $1,000 due on that note was paid by the plaintiff, and charged against the mortgage. This is the point at which the dispute arose. The defendant disputes the plaintiff's right to pay this note out of the mortgage moneys. He contends that under the verbal agreement which was made at the time of the written agreement in March, 1894, plaintiff was, as between themselves, liable to pay one-half that $1,500 note. The argument of the defendant is, that the effect of the verbal agreement alleged was to make the defendant and plaintiff partners in the closet company business, and each liable for one-half the then existing debts of the company.

It seems to me, however, that the defendant's case is not made out by evidence that the relationship of partners was then created between them.

If that were the determining issue between the parties, I should have to find in favour of the defendant. The plaintiff's admission contained in their joint letter to the manager of the Imperial Bank is quite sufficient to shew that a partnership did subsist between them. In the absence of an agreement to the contrary, however, the plaintiff would only be liable for debts incurred by the firm after its creation. He would have no liability for the debts of the defendant incurred before that date. I did not understand the defendant to say that the plaintiff expressly agreed to become liable for half of his then existing debts, but he rather put it forward as an inference from the plaintiff's agreement to raise $5,000 on their joint note, half of which was to be applied in payment of the defendant's then existing debts, and the balance to be used in carrying on the business. The other half of the defendant's debts was to be discharged out of the $2,500 which the plaintiff had agreed to pay the defendant for a half interest in the patents. The plaintiff

says that of the money to be raised on their joint note $2,500 was to be applied in wiping out his debt to the defendant under the agreement, and the balance to release certain claims against some 500 of the manufactured closets then warehoused in the city. If the plaintiff's statement as to how the proceeds of this suggested loan were to be applied, be correct, he would, of course, be, as between himself and the defendant, liable for one-half this proposed note. Even if the defendant's version of the matter be accepted, I do not think it establishes the plaintiff's liability for any portion of the defendant's past debts.

Long before defendant applied for the loan for which the mortgage in question was given, the plaintiff had paid him the $2,500 called for by the agreement, and the defendant had applied it in payment of his old debts. Half of these debts was thus wiped out. One thousand dollars of the proceeds of the $1,500 note was also applied in payment of these debts. The liability to this extent was, however, only transferred to the bank. It is admitted that the mortgage loan asked for was to be used to clean up the balance of these old debts. The defendant was thus making provision for the payment of all these debts himself, instead of calling upon the plaintiff to discharge the one-half of them, as he says he agreed to do.

Where parties of equal respectability and with apparently equal sincerity tell contradictory stories, it is extremely difficult to decide between them. In this case, however, the onus is upon the defendant to establish by competent evidence the defence relied upon. To my mind, he has failed to discharge that onus. It follows that the plaintiff cannot be held liable to pay any portion of the debts incurred by the defendant prior to 19th March, 1894, and that he had a right to charge as against the mortgage the amount paid to the Merchants Bank to take up the balance of the $1,500 note discounted there.

There will be judgment referring it to the Master to take an account of the amount due upon the mortgage on this basis.

If the defendant so desires, there may be a reference to the Master to take accounts of the partnership existing between the plaintiff and defendant under the name of "The Manitoba Ventilating Closet Co.," from 19th March, 1899.

Further directions and costs are reserved.

MANITOBA.

CAMERON, J. MARCH 6TH, 1908.

TRIAL.

FRASER v. CANADIAN PACIFIC R. W. CO.

Railway—Agreement with Municipality — Confirmation of Statute—By-law—Permission to Alter Grade of Streets and Construct Subway — Injury to Land Fronting on Streets—Injunction—Construction of Agreement—Work Done in Accordance with Agreement—Order of Board of Railway Commissioners—Jurisdiction—Parties—Crown —Judgment on Motion for Interim Injunction — Confirmation on Appeal—Judge at Trial not Bound by.

Action for an injunction to restrain the defendants, the Canadian Pacific R. W. Co. and the Corporation of the City of Winnipeg, from injuring the property of plaintiff, two lots on the north-east corner of Rachel street and Point Douglas avenue, in the city of Winnipeg.

The defendants the railway company built a spur track across part of Point Douglas avenue, which prevented plaintiff's approach to his lots from the west. In addition, the earth taken out from the Rachel street subway was dumped on his lots without his leave.

W. R. Mulock, K.C., and C. P. Wilson, for plaintiff.

H. A. Robson and A. S. Bond, for defendants the railway company.

I. Campbell, K.C., and T. A. Hunt, for defendants the city corporation.

CAMERON, J.:—By-law No. 2790 of the city of Winnipeg, validated and confirmed by the legislature of Manitoba (3 & 4 Edw. VII. ch 64), authorized the Canadian Pacific Railway Company, under the agreement set forth therein, to rearrange their tracks upon Point Douglas avenue, to reconstruct the same and construct additional tracks, and, for that purpose, should the company think proper, to raise the grade and surface of the avenue, or of any part thereof, and tracks thereon, to a height not exceeding 10 feet above the then existing grade. The width of the avenue is 66

feet, and it had already been partly occupied by the company under by-law No. 143, of 3rd March, 1881. Purporting to proceed under the above agreement and plans thereunder, the railway company raised the grade of the southerly 45 feet of the avenue 6.7 feet above the level of the northerly 21 feet, and constructed a subway under the 45 feet, with approaches from Rachel street on the north and Annabel on the south; such subway and approaches conforming with the plans. The plaintiff owns a parcel of land, comprising two lots, situate at the corner of Rachel street and Point Douglas avenue, with 132 feet frontage on each, and brought this action on 4th November, 1905, to restrain the defendants from proceeding with the work, and for other relief.

It is alleged on behalf of the plaintiff that his property, by reason of the raising of the grade and of the construction of the subway and of the excavation of the approaches from Rachel street, has been injuriously affected, and that, under the true construction of the above agreement, the company are bound to raise the grade of the northerly 21 feet uniformly with that of the southerly 45, and to construct the subway under the whole width of the avenue. A mandatory injunction compelling the defendant company to do this is asked for at the trial of the action, upon obtaining which the plaintiff proposes to recover compensation. The questions at issue are thus reduced within a narrow compass.

I have given the wording of the agreement in question (which is not entirely free from ambiguity) my best consideration, having in view the whole work contemplated thereby, its character, and the attendant circumstances. Under sec. 1 of the agreement, the company are given the privilege of raising the grade on Point Douglas avenue, "or of any part thereof," to the height limited thereby. Section 15 of the agreement prescribes that the company shall, when the grade on Point Douglas avenue is raised, construct a subway, in lieu of the crossing therein mentioned, "from Annabel to Rachel streets" across the avenue, the character and plans of which shall be approved by the council. Rachel street runs northerly and Annabel street southerly from the avenue. The avenue ante-dates both these streets. It is contended that the subway, to be constructed "in lieu of the crossing," must run wholly underneath the avenue for its whole width of 66 feet, and that the grade on the

northerly 21 feet must be raised to a level with that of the southerly 45. It, therefore, becomes necessary to examine the words "or any part thereof" in the 5th and 6th lines of sec. 1 of the agreement.

Obviously, these words mean what they say, and must be held to include the dimension of breadth, unless they appear to be otherwise controlled or limited. I am unable to find in this agreement, in secs. 1, 3, 15, or elsewhere, any unequivocal expression of intention to give these words other than their natural signification.

On the contrary, I find in sec. 1 an intention declared that the northerly 21 feet can be considered and dealt with separately from the southerly 45 feet of the avenue; and, read in connection with this declared intention, the words "or any part thereof" must be taken to refer to width. This intention to separate the southerly 45 feet from the northerly 21 reappears in sec. 3, and it is to be noted that the subway provided for by sec. 15 is to be in substitution for the crossing mentioned in the third section.

The length of the subway is nowhere precisely specified in the agreement. That, with other details, is left undetermined except so far as covered by the words found in the 15th section, that "the character and plans" of the subway "shall be submitted to and approved by the council." It is entirely reasonable to conclude that this provision was made, because it was in the contemplation of the parties that the southerly 45 feet should be raised before the northerly 21.

The word "subway" is not, in my opinion, a strictly technical term, and it can readily and reasonably be held to include not only the passage underneath the superstructure but the approaches thereto. The words "from Annabel to Rachel streets" are not to be read in their narrow topographical meaning, but in a popular sense, and as words of description merely. Considering that the term "subway" can be taken to include the approaches, I find no difficulty on this point.

I, therefore, hold that the subway has been constructed and is intended by the defendants to be constructed in accordance with the agreement in question and with the plans made pursuant thereto.

It was argued, with considerable force, that the effect of this construction would be to leave the avenue intersected by the excavation at Rachel street, and therefore rendered

useless and no longer in "good passable condition." In some measure this is, no doubt, the result. But it cannot be contended that the avenue will thus be wholly destroyed as a thoroughfare. It is still capable of being extensively used, and the extent to which traffic upon it is hampered by the excavation north of the 45 feet seems to me a necessary incident of the agreement between the city and the railway company, which was presumably within the contemplation of the parties. In large and expensive works of this character, involving many and conflicting interests, anomalous conditions are almost certain to arise. If these result in damages to individuals, then compensation therefor must be sought in the manner prescribed by law. In my judgment, the provisions of sec. 1 of the agreement are subject to those of sec. 15, the subway need not necessarily be carried under the whole 66 feet of the avenue, and, in this respect, the plans and the work done in accordance therewith do not conflict with the agreement.

After the interim injunction order herein was granted on 4th December, 1905, an order was made by the Board of Railway Commissioners on 20th December, 1905, that the railway company be granted leave to construct a subway in lieu of a level crossing "where its railway tracks cross Rachel street," as shewn on plans filed, and that the plans be approved. This order of the Board is pleaded in bar by the defendants, and the plaintiff alleges that it was obtained suppressing the fact that this action had been brought and the injunction order obtained. It appears that no application has been made to the Board to rescind or vary its order. There can be no question of its jurisdiction to make the order, and it still stands in full force. It is strongly urged that I should, under the circumstances, look at the order as permissive merely, and disregard it or set it aside. I feel, however, that I cannot accede to this argument. If any authority were needed, the decision of Clute, J., in Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 12 O. L. R. 320, 7 O. W. R. 814, is in point. The Board may make an order without notice, but any person entitled to notice may apply to vary, amend, or rescind it. It seems to me beyond question that the plaintiff is effectually concluded by the order of the Board.

It occurred to me that, as the ownership of the avenue is vested in the Crown, the Crown should be made a party, especially as other interests than those of the plaintiff might

be affected by the issue of a mandatory injunction. But it is not necessary to discuss this, or the question of the status of the plaintiff, or of the propriety of the form of proceedings taken, as I hold that the plans and the work done and intended to be done under the plans filed with the Board of Railway Commissioners are not in violation of, but in accordance with, the agreement ratified and re-enacted by the legislature and approved by the order of the Board of Railway Commissioners.

I cannot yield to the argument that I am practically bound by the judgment granting the interim injunction, affirmed on appeal. That order does not, and was not intended to, divest me of the responsibility of deciding this case upon the merits as presented at this hearing. In the public interest, and on the grounds stated, I hold that the order should be dissolved.

The action will therefore be dismissed with costs, including the costs of the motion for injunction.

MANITOBA.

DUBUC, C.J. MARCH 6TH, 1908.

TRIAL.

MILLS v. BRYCE.

Trespass to Land—Removal of Buildings—Action to Recover Value—Title to Land—Proof of—Ownership of Buildings—Annexation to Freehold—Equitable Interest—Repairs.

Action to recover the value of certain buildings removed by defendant Bryce from plaintiff's land in the town of Neepawa, and transported by Bryce to land belonging to defendant Maywood.

C. P. Fullerton, for plaintiff.

R. G. Affleck, for defendants.

DUBUC, C.J.:—Two points were raised by the defence: (1) that the lots from which the buildings were removed

were not the property of the plaintiff; (2) that the buildings, though standing on the plaintiff's land, did not belong to him.

As to the first point, the plaintiff has produced a complete chain of title to this land from the patentee thereof down to himself. One of the late owners thereof was John Crawford, who made a conveyance of the land, by deed dated 7th April, 1890, to David Mills, father of the plaintiff. David Mills conveyed the same to plaintiff by deed dated 7th October, 1905.

It is contended on behalf of the defendants that David Mills, after living some time on the lots in question, abandoned the same, leaving the property in the hand of Crawford, and allowing Crawford to deal with it as his own. But the evidence shews a different state of facts. David Mills, on leaving the premises, made an arrangement with Crawford by which Crawford would collect the rent of the house, pay the taxes, and apply the balance on his own indebtedness to him. The above is the version of David Mills, and the fact that no reconveyance was made corroborates it.

It is also contended that some years later, after a fire had damaged the house, Crawford sold the property to A. H. Rogers, who repaired and improved the buildings; but no conveyance was ever delivered or signed by Crawford to Rogers.

The point was also raised that Larne Mills, the plaintiff, never paid anything to his father, David Mills, for the property. He promised to pay him $200, and has as yet paid nothing. I do not see how that could affect the case, as David Mills, having a good title to the land, could properly transfer it to his son, even without consideration.

As evidence that Crawford knew that he had no title to this land, it has been shewn that he brought an action to recover the same against David and Larne Mills; and afterwards discontinued the same, and paid the costs.

The plaintiff has, I think, shewn a complete title in himself to the lands in question.

As to the buildings in question, it is contended by the defendants that they were not the property of the plaintiff. The evidence shews that some time in 1905 the original buildings formerly occupied by David Mills were damaged by fire. David Mills not being there, an arrangement was made between Crawford and A. H. Rogers, by which Rogers was to repair the buildings and have possession of the same.

This was done. Some time afterwards, Rogers pretended to sell the land and buildings to A. E. Grassby, partner of defendant Maywood, and gave him a quit claim deed for the same dated 15th January, 1906. The defendant Maywood, finding that Rogers had no title to the land, proceeded to have the buildings removed and transported to one of his own lots in the same block.

It has been argued that the buildings had no foundations, were merely laid on the ground, and could be removed as chattels. But it was shewn that the sills were two feet below the level in the ground. They must be held to have been fixtures attached to the freehold.

The plaintiff had, no doubt, a legal title to the premises, but the defendants had an equitable interest in that portion at least of the buildings erected by Rogers and purchased from him.

Taking into consideration the different facts and circumstances of the case, I think the plaintiff should be allowed to recover the value of the buildings as they were after the fire, when Rogers, on some arrangement made with Crawford, was let into possession, and proceeded to repair the old buildings and erect new ones. The old buildings have been valued by R. J. Carson, a carpenter, as follows: the old house, $250, the old kitchen, $50.

I therefore think judgment should be entered for the plaintiff for $300 and costs.

MANITOBA.

DUBUC, C.J. MARCH 6TH, 1908.

TRIAL.

BENNETT v. C——.

Physician and Surgeon—Malpractice — Negligence — Evidence.

Action to recover damages for injury suffered by plaintiff by reason of the alleged negligence, carelessness, and unskilfulness of the defendant, as a physician and surgeon, in performing an operation upon her.

N. F. Hagel, K.C., and W. Monahan, for plaintiff.

I. Pitblado, for defendant.

DUBUC, C.J.:—In order to succeed, the plaintiff has to shew: (1) that there was negligence or want of skill or carefulness on the part of the defendant in performing the operation; (2) that she has been injured by the operation, and that the injury is the result of the negligence and want of skill of the defendant.

She contends that the defendant, having been employed by her to remove a tumor affecting a diseased organ, did at the same time unnecessarily remove certain healthy organs of her body, by which removal her health has been greatly injured.

The defendant in his evidence admitted that the diseased organ could have been removed without necessarily removing the healthy ones, but he stated that in such cases as the one in question it is considered advisable and good practice to remove the other organs which he did remove, because those other organs have no more practical usefulness after the removal of the diseased organ of which they are deemed appendages, particularly in a woman over 40 years of age; he said also that after the removal of the principal organ, viz., the womb, if the ovaries and fallopian tubes are left, they may become the seat of another tumor; that these possibilities are a recognized principle of surgical science. He was corroborated in this by other surgeons examined at the trial on behalf of the plaintiff. He also produced and quoted from several standard works on gynæcological surgery expressing the same views.

The plaintiff, who was 42 years of age at the time of the operation, has sworn that, since the operation, she has been nervous, in a feeble and poor state of health, and that she is no more able to work as she used to do before. But there is nothing in the evidence to shew that her present state of ill-health and nervousness has been caused by the negligent and unskilful manner in which the operation has been performed on her. She has consulted and has been examined by several doctors and surgeons since the operation made by the defendant, and not one of them has been called to testify as to the cause of her actual ill-health. It may perhaps be accounted for by the fact that she left the hospital on 22nd December, 1904, 21 days after the operation, and drove to her home about 9 miles west of the city, in very severe weather, and remained there the rest of the winter without calling any doctor to dress her wound, or

give her other professional assistance, and only attended by her husband and some young girls who were not trained nurses.

In my opinion, the plaintiff has failed to establish her case, and the action should be dismissed with costs, including costs of examination of the plaintiff for discovery and also costs of the commission to Chicago.

MANITOBA.

MACDONALD, J. MARCH 11TH, 1908.

TRIAL.

ROBERTSON v. CARSTENS.

Principal and Agent—Agent's Commission on Sale of Land —Employment of Agent—Evidence.

Action for commission on sale of land.

H. A. Robson and W. J. Donovan, for plaintiffs.

T. R. Ferguson and J. A. McKay, for defendant.

MACDONALD, J.:—The plaintiffs are tradesmen, their business being that of carpenters and contractors; they rented the property from the sale of which the commission, the subject of this action, is claimed.

They carried on their business as carpenters and contractors in these premises.

They wanted a lease for a year, but the defendant would not lease otherwise than by the month, as he was desirous of selling. The plaintiff Robertson discussed the purchase of the premises, and offered as part payment some property owned by him in Elmwood. This the defendant would not consider. The defendant gave him his price and terms. And, although it is possible the plaintiff Robertson may have thought that he was being authorized to find a purchaser, I am satisfied that the defendant did not so understand it.

The defendant knew the plaintiffs only as his tenants, as carpenters and contractors, and from the knowledge of

the fact that they were anxious to secure the premises for a term longer than by the month, it is reasonable to conclude that the defendant would not look upon them as anxious to have a sale effected.

The witness Forrester was not the purchaser of the property; he was a real estate agent looking for property suitable for what he had in view; and, seeing the property in question, and not knowing the owner, he very naturally called upon the occupants to ascertain who the owner was.

There is a conflict of evidence as to what took place. Robertson says that upon learning Forrester's mission he telephoned the defendant and got from him the price and terms upon which he would sell, and that he mentioned Forrester's name and referred to the commission, and that the defendant agreed to pay him a commission. It is denied by Forrester that his name was mentioned or that commission was referred to in the telephonic conversation by Robertson.

Robertson's partner and co-plaintiff corroborates his (Robertson's) testimony.

Carstens, the defendant, on the other hand, denies having been advised by the plaintiff Robertson of Forrester's name, or any reference to the commission being made.

Robertson says that he told the defendant that he had a purchaser at $15,000, and that, after finishing his conversation with defendant, he turned to Forrester and said, the price is $15,000 net, which he explains by saying that that was the price at which Forrester could purchase, and that he (Robertson) would get his commission from the defendant, and that Forrester replied, "I am glad of that, I will get my commission elsewhere."

The plaintiffs must have then known that Forrester was not the purchaser; that he also was a real estate agent looking for a commission.

The plaintiffs then gave Forrester their business card ("Robertson & King, Carpenters and Contractors"), upon which there is no reference to their business being that of real estate agents; upon this they gave Forrester the name of the defendant and his address. Forrester called at the place of the defendant, but, not finding him there, left a message asking him to call at his house that evening. As a further evidence of defendant's want of knowledge of Forrester being the person about whom the plaintiff Robertson telephoned, he expected to meet a Mr. Forrester, an

acquaintance; he called at the address given, and met the witness Forrester, who introduced himself and broached the subject of the purchase of the property mentioned, not disclosing the fact of his interview with the plaintiffs, and not making use of the card given him by them. Forrester's motives are apparent; he did not intend to be a middleman in the transaction, and did not want a division of the spoils with the plaintiffs.

An agreement was entered into between him and the defendant by which the latter agreed to accept $14,000, and Forrester could have any surplus over that amount (up to $17,500), at which he could sell. It seems very evident that Forrester had a purchaser in readiness at $17,500.

It seems to me incredible that if the defendant had been aware of the offer of $15,000 alleged to have been telephoned by the plaintiffs, he would so readily consent to an offer of $14,000.

I find that the defendant did not learn the name of the purchaser, nor of Forrester, through the plaintiffs, and that he did not know them as real estate agents, and that the property was not in their hands for sale under any contract with them, and that the sale was made through the witness Forrester, without any knowledge of the plaintiffs' interview with him.

The action must be dismissed with costs.

MANITOBA.

MACDONALD, J. MARCH 11TH, 1908.

TRIAL.

PATTON v. PIONEER NAVIGATION AND SAND CO.

Water and Watercourses — Lands Bordering on Navigable River — Rights of Riparian Owner — Removal of Sand from Bed of River—Effect of—Nuisance—Ownership of Soil in Bed of River—Trespass—Injunction—Rights of Navigation.

Action to restrain defendants from dredging sand from the bed and bottom of the Assiniboine river, opposite plain-

tiff's property in the city of Winnipeg, having a frontage on the south side of the river.

An interim injunction was granted and continued till the trial.

J. A. M. Aikins, K.C., H. A. Robson, and J. B. Coyne, for plaintiff.

J. H. Leech and F. Sutton, for defendant company.

J. E. O'Connor and H. P. Blackwood, for defendant Hall.

A. B. Hudson and E. L. Howell, for the defendant the Attorney-General for Canada.

MACDONALD, J.:—The plaintiff alleges that at different places in the bed of the river, and below the surface of the water of the same, there are beds of sand, and these beds of sand form the bottom of the river, and are part of its bed, and form the natural support of the plaintiff's premises; that at divers times previous to the year 1901, and from that year continuously down to the date of the issuing of his statement of claim, the defendants have, by a steam dredge and steam apparatus anchored in the river opposite to and adjoining the land of the plaintiff, taken and removed large quantities of sand from the bottom of the river and from the sand beds in the river which form the river bottom and bed; and that the removal of these banks and beds of sand opposite to and adjoining the lands of the plaintiff causes the shore of the plaintiff's land and adjacent shores and the plaintiff's land to subside and slide into the river and be washed away, and causes the shores of the river and the plaintiff's land to be irregular and broken, and that for some time past the defendants have wrongfully and unlawfully excavated, taken, and carried away the sand in the bottom and bed of the river opposite to and adjoining the land of the plaintiff, thereby removing the support for plaintiff's land, and are continuing to do so, whereby the plaintiff's land, being that part thereof which forms the bank of the Assiniboine river, owing to the wrongful and unlawful acts of the defendants in taking away the sand, has lost and will lose its natural support, and has been and will be caused to sink and fall, and be carried away, and a large portion of the plaintiff's land, owing to the wrongful and unlawful acts of the defendants, has been and is being and will be carried away by the river, and his property has been and is now being and will be greatly diminished in

value and irreparably injured on account of and by reason thereof and of the bank sinking and being carried away owing to the wrongful and unlawful acts of the defendants, and if the defendants continue their wrongful acts and trespasses, serious loss and irreparable injury will accrue to the plaintiff's property.

The defendants by their statement of defence (inter alia) aver that if they did remove or intended or now intend to remove any sand from the bed or bottom of the river opposite to or adjacent to the plaintiff's land, the river was then, and has ever before and since been, a navigable stream, and the bed and bottom and banks thereof were, and still are, vested in and owned by the Crown in right of the government of Canada, and the sand removed, if any, was then the property of the Crown in right of the government, and the sand, if any, which the defendants now or then or at any time intend or intended to remove is and was the property of the Crown in right of the government.

On 30th September, 1907, the plaintiff amended his statement of claim—the defendant Robert Hall having been previously made a co-defendant—by setting forth that he owned the bed of the river opposite to and adjacent to his land to the middle of the river, and the sand thereon.

In this amended statement of claim, he further alleges that the defendants have, in the operation of their steamboats, barges, steam suction pumps, and other steam apparatus, wrongfully caused unwholesome and noxious smoke in large quantities and a great and constant noise to issue from the said steamboats, barges, steam suction pumps, and other steam apparatus, causing great disturbances and annoyance to the plaintiff and the inmates of the plaintiff's house on his lands, materially diminishing their comfort and the value of the land, and threaten and intend to continue the said nuisances.

There are thus three issues to be investigated:—

(1) The effect of the dredging of sand from the bottom of the river upon the banks.

(2) The nuisance complained of.

(3) The ownership of the soil in the bed of the river.

The Assiniboine river, for some time prior to the year 1882, was used to a considerable extent in the spring of the year and at time of high water, as the means of transportation of passengers and freight from Winnipeg to parts west, as far as Fort Ellice and Fort Pelley, being several

hundred miles west of Winnipeg. This continued until the year 1882, upon which date the Canadian Pacific Railway was constructed and operated to the points at which the boats had in previous years touched, and, by reason of the distance by rail being much less than by the water route, the traffic by water practically ceased in that year.

It was only in the spring of the year that the river could be used as referred to, the water being too shallow at other times for that purpose. Navigation was, therefore, possible for only a few weeks in the year. It was, however, navigable to some extent, and it is only by reason of disuse, and the constant allowing of obstructions to accumulate, that it is not as navigable now as it was then.

I find that the Assiniboine river is a non-tidal navigable stream.

The plaintiff's contention is, that the banks of the river at his property are composed, to a considerable extent, of sand, and the evidence establishes that fact, although the defendants endeavour to meet that contention by having made borings 20 feet from the water's edge in, on, or near the plaintiff's land, and the samples of earth produced shew very little, if any, traces of sand, although it is shewn in the evidence of the witness who did the boring, that having bored late one evening and having left the auger with which he was operating in the hole over night, on his resuming his work the following morning, he found, on withdrawing the auger, that the hole had filled in with water to the level of the river, thus shewing the pervious character of the soil. There would be danger, therefore, in dredging the river bottom too near the plaintiff's banks, as I believe the result would be the gradual undermining of the banks.

The same condition applies to the property of William Martin adjoining that of the plaintiff.

The other properties (the owners of which have taken proceedings similar to those of the plaintiff herein) the location of which is referred to in the evidence, and known as Armstrong's Point, are more seriously affected.

It is alleged by the defendants that the sand which they are dredging comes down the river, its source being the sand hills from points west of Portage la Prairie and between there and Winnipeg. On the other hand, it is contended that it does not come down the river, but that the sand taken has been the accumulation of years, and part of the

original formation, and forms the foundation, and it is the natural support of the lands in question.

Assuming the position taken by the defendants to be the correct one, and that the sand is constantly coming down the river, and that, as they aver, Armstrong's Point has grown by the accretions of sand, salt, and mud coming down the river, it is but reasonable to conclude that a great proportion of these accretions is composed of sand, and the disturbance of this sand would weaken the banks and cause them to subside.

Subsidences have taken place, and some of the properties at Armstrong's Point have been seriously affected, but it is contended by the defence that these subsidences have been caused by the high water soaking into the soil and the ice going down the river in the spring jamming against the banks, causing the earth to be broken and to fall into the river, when the river asumes its natural condition. I believe this has happened. Mr. Fisher, one of the riparian owners, says that on his place the first big break was 20 years ago. This could not be attributed to the dredging operations of the defendants, as it was before they had done any dredging there. There had ben dredging prior to that time; but it is impossible to determine the effect (if any) that such dredging had upon the banks.

A great deal of evidence of an expert character was given, tending to prove and disprove the source of the sand dredged by the defendants. It all could not possibly have come out of the banks opposite the scene of operations, the quantity taken out being so large as to disprove that theory.

It could not have been the result of years of accumulation in any event, to the extent found there by the defendants in 1899.

Robert Hall says that in 1895 he went up to Armstrong's Point, and at no place could he find more than one foot of sand. In 1899 he again went up the Assiniboine, and found large quantities of it, and then commenced dredging operations at Armstrong Point and vicinity. Where then did this sand come from? I am convinced that, at least, the greater quantity of it came down the river, and, if the dredging was of such sand only, and before it had assumed a stable condition, it could not have any effect upon the banks.

But, according to the evidence of the defendants' witnesses, the greater deposit of sand coming down, was at Armstrong's Point, the coarser depositing first as the ve-

locity of the river reduced and the lighter sand and silt depositing last and near the banks, where was the lesser velocity. This lighter sand was not what was required by the defendants, although they admit getting a considerable quantity of it with the coarser sand.

A number of the expert witnesses say that, by the dredging of this sand, it is impossible to affect the banks, basing their opinions on scientific knowledge and the angle of repose of the river banks and the continuation of the toe of those banks into the river being brought into much prominence. Other experts, however, disagree, asserting that any interference with the alveus of the river by the removal of obstructions or otherwise will have an effect upon the banks. These expert witnesses do not, therefore, assist me much in coming to a conclusion, and I can only use the best judgment of which I am capable.

Considering the width of the river (varying from 150 feet to 200 feet at the points from which the sand was taken), the sandy and pervious character of the soil in those banks, and the effect of their dredging, being but a question of distance from the banks from which those operations are conducted, there is, in my opinion, a danger of wearing away the toe of the bank, causing it to be drawn into the channel created by the dredging operations and gradually undermining the banks, causing them to subside. The evidence on behalf of the plaintiff does not satisfy me that such has been the result of the dredging in the past, but there is that danger, should the defendants be permitted to carry out their expressed intention of continuing their operations, if not enjoined.

The spring freshets and ice jams have, in my opinion, been the principal causes which have led to the subsidences complained of by the plaintiff, but I am fully convinced that the dredging, if it has not already assisted, will, if continued, accelerate, the work of the destruction of the banks. The dredging must have an effect upon the natural flow of the water, and "what may be the result, no human being, with certainty, knows."

The defendants have encroached upon the bed of the river opposite the properties of the plaintiff, and they say that, unless restrained, it is their intention to continue their operations, and I think the plaintiff is entitled to an interdict against future encroachments.

The plaintiff complained that the operations of the defendants were a nuisance. Upon this issue I do not think the plaintiff can succeed. On a few occasions the noise and smoke necessary in carrying on their work caused some annoyance, but so little was thought of it that not until over a year after this action was brought, by amendment to the statement of claim, were there any serious complaints made. It is possible that the operations of the defendants might be carried on in such a manner as to constitute a nuisance which the Court would abate, but, at this late date after the acts complained of, I would not feel justified, upon the evidence adduced upon the trial, in finding against the defendants.

The material and more important issue involved is that of the ownership of the soil in the bed of the river, and in determining this I am assisted by the recent findings of the Court of Appeal for Ontario in Keewatin Power Co. v. Town of Kenora, decided since the commencement of the trial of this action, 11 O. W. R. 226.

The plaintiff derived title through the Hudson Bay Company. The laws applicable to the transfer of real property prior to this becoming Canadian territory were the laws which existed in England on 2nd May, 1670, as far as such laws were applicable. The Statute of Frauds was not in force, and a mere verbal bargain and sale of land was sufficient to pass title both at law and in equity. The title of the plaintiff was derived through this method of transfer, but after the transfer of Rupert's Land and the North-West Territories by the Hudson's Bay Company to the Dominion of Canada, conformable to one of the terms of the deed of surrender, patents issued to the then owners of the lands in question confirmatory of the titles they had had from the Hudson's Bay Company.

The description is of a portion of a parish lot, as shewn in a plan of survey according to the Dominion government survey of the parish of St. Boniface. The parish lots, according to this plan, run to the Assiniboine river, and the plaintiff alleges that, as a riparian owner, he is entitled to the bed of the river usque ad medium filum aquæ. The defendants, on the other hand, contend that the land owners are not riparian proprietors; the land owners, having accepted patents from the Crown, are bound by the reservations therein, and one of the reservations is the free use, passage, and enjoyment of, in, over, and upon all navigable waters that now are, or may hereafter be, found on or under

or flowing through, or upon, any part of the said land, &c. This reservation would seem to me to be a strong presumption of non-ownership by the Crown in the soil underneath the river.

The laws of England, as they existed in 1670, were the laws in force at the time of the grant of this territory to the Hudson's Bay Company, and such laws continued as the laws of the Hudson's Bay Territory, known as Rupert's Land, until the date of the surrender of such territory by the Hudson's Bay Company to the Crown, and later the province of Manitoba introduced the laws of England as such existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

To determine, therefore, the rights of the riparian owners in this province, we must look to the laws of England.

Under the common law, the rights of riparian owners were governed by the nature of the river as to whether tidal or non-tidal. In tidal navigable waters, the title to the alveus is in the Crown, unless expressly granted, and in non-tidal rivers, whether navigable or non-navigable, the title to the alveus is presumed to be in the riparian proprietor.

This presumption, it is contended on behalf of the defendants, is rebuttable, and it is contended that the fact that the plaintiff has never exercised any act of ownership over the bed of the stream rebuts that presumption; the character of the river makes it difficult to do any overt act of assuming the ownership of it; there are so few uses to which it can be put. It must also be borne in mind that the present riparian owners have not been many years in possession; and from the commencement of such operations by the defendants as came under their notice, and as affecting them, they objected and took proceedings to compel them to stop. I do not think from the evidence adduced that I should be justified in holding that the defendants have rebutted the presumption of ownership.

There is not, it is true, an express grant of the bed of the river from the Hudson's Bay Company, through whom the plaintiff derived his title, but I am of the opinion that the titles through the Hudson's Bay Company carry with them all the rights of riparian owners.

The case of Bickett v. Morris, L. R. 1 H. L. 47, seems to me applicable to and to govern my decision in this case. The decision in that case is, that when the lands of two coterminous proprietors are separated from each other by a running stream of water, each proprietor is prima facie owner of the soil of the alveus or bed of the river ad medium filum aquæ. It was also held in that case that, although each was entitled to the soil, neither one had the right to do anything on his side of the river to interfere with its channel or natural course. The dredging must have an effect upon the natural flow of the water, and what may be the result?

The following language of Lord Cranworth is peculiarly applicable to this case: "There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony; they are allowed to say, we have all a common interest in the unrestricted flow of the water, and we forbid any interference with it. This is a plain, intelligible rule, easily understood and easily followed, and from which I think you ought not to allow any departure."

In the recent case of Servos v. Stewart, 15 O. L. R. 216, 10 O. W. R. 528, and cases there cited, it was held that, notwithstanding the metes and bounds, if the Crown grant were expressed to begin "on the shore of Lake Ontario," the plaintiff's land extended to low water mark and entitled him to an injunction restraining the defendant from digging up or removing any sand or gravel between the plaintiff's land and the low water mark of Lake Ontario, and against the removal of any sand or gravel which forms a natural barrier against the encroachment of the lakes.

Is not the riparian owner, therefore, along the banks of the Assiniboine river entitled to have left undisturbed the sand and gravel which come down the river and form deposits opposite his property? I am of opinion that he is.

But the defendants say this dredging of sand is an act of navigation. If the object of the dredging was the removal of obstructions to facilitate navigation, it, no doubt, would be an act of navigation, but the dredging of sand being solely for commercial purposes, and for the direct benefit of the defendants, I am unable to accept the view urged by counsel for defendants.

After a perusal of some of the numerous cases cited by counsel on both sides, I find that the title to the alveus of the river usque ad medium filum aquæ is in the plaintiff, subject to the rights of navigation and to all rights incidental thereto, and the plaintiff is entitled to an injunction restraining the defendants, their servants or agents, from digging up or removing sand or gravel anywhere in the Assiniboine river opposite to and adjoining his property in the statement of claim described.

At the opening of the case Mr. Howell moved that the Attorney-General for Canada be made a party defendant, and intimated that he was retained in the case to watch the interests of the government. This motion was granted. There will be no costs for or against the Crown.

The other defendants to pay the costs of the issue upon which the plaintiff succeeds and the plaintiff the costs incidental to the issue upon which he fails.

[The cases of Amelia Fisher, W. J. Tupper, William Martin, Alfred C. Bulling, and Henry N. Ruttan, against the above defendants, being by consent tried with the case of Francis L. Patton against them, and the evidence in the latter case made to apply to all, there will be judgment in each case the same as in the Patton action.]

MANITOBA.

CAMERON, J. MARCH 14TH, 1908.

TRIAL.

VOPNI v. STEPHENSON.

Costs—Action for Money Demand—Recovery of Small Part of Amount Claimed—General Costs—Witness Fees.

Action to recover $1,773.60 for goods supplied. At the trial judgment was given for the plaintiffs for $313.

H. W. Whitla, for defendants, then applied for a certificate for costs.

A. B. Hudson, for plaintiffs.

CAMERON, J.:—This action was brought to recover $1,773.60 for goods supplied. The defendant Clark transferred to Vopni, the president of the plaintiff company, a mortgage to secure $1,200, for the expressed consideration of $1,300. I held that this transfer was intended to be, and was, a payment of $1,300 on account of the indebtedness. The defendant also partly succeeded in respect of two other items. I found a balance due of $313, for which I directed judgment to be entered for the plaintiffs. On the record and the evidence, had the defendants succeeded in all their contentions, there would still have been a balance due by them. On the other hand, had they paid into Court the sum of $313, they would have entirely succeeded in the action and have been entitled to their costs. Not having availed themselves of this course, which was open to them, I hold the plaintiffs entitled to their general costs of the action. I can not allow the plaintiffs, however, the expenses of their witnesses other than Vopni himself.

MANITOBA.

MATHERS, J. MARCH 17TH, 1908.

CHAMBERS.

NATIONAL TRUST CO. v. CAMPBELL.

Mortgage—Action on Covenant and for Foreclosure—Summary Judgment under Rule 602 for Amount Due under Covenant—Default in Payment of Instalment—Acceleration Clause—Judgment for whole Mortgage Money—Application to Set aside—Relief upon Payment of Instalment with Interest and Costs—Rule 278—Real Property Act, sec. 117.

Appeal by plaintiffs from an order of the Referee in Chambers, upon an application by defendant to set aside the final judgment signed by plaintiffs upon an order for summary judgment under Rule 602, refusing the application, but staying proceedings, under Rule 278, upon payment by the defendant of the overdue instalment of principal with interest and costs.

The ground of the appeal was that defendant's notice of motion did not ask for relief under Rule 278, but only that the judgment be set aside, and that the Referee had, therefore, no power to make the order appealed from.

A. C. Galt, for plaintiffs.

J. F. Fisher, for defendant.

MATHERS, J.:—There is ample power under Rule 344 to amend the notice of motion given herein, and an amendment should be allowed if the plaintiffs are not prejudiced by it: Gill v. Goodfin, 25 Ch. D. 707. I think the defendant should now be given leave to amend his notice of motion, so as to ask for the relief to which, on the material before me, he appears to be entitled.

At my request counsel argued the question of the defendant's right to relief under Rules 277 and 278. The action is for foreclosure and for judgment upon the covenant to pay contained in a mortgage made by the defendant. The mortgage was payable by instalments, and contained an acceleration clause, making the whole principal due upon default in payment of any instalment. Default was made, and, under this provision, the plaintiffs claimed judgment for the entire principal. The defendant entered a defence, and the plaintiffs moved under Rule 602 for judgment against the defendant for the amount of their money claim. The motion was undefended, and an order was made by the Referee pursuant to which judgment was signed. The motion to the Referee was to set aside this judgment, upon the ground that Rule 602 does not apply to such an action as this. As before stated, the Referee refused to set aside the judgment, but granted relief under Rule 278. The defendant has not appealed from the Referee's refusal to set aside the judgment, so that objection is not now open to him and need not be considered.

It was held by some of the earlier authorities that a provision in a mortgage that upon default in payment of an instalment of principal or interest the whole should become due, was in the nature of a penalty against which equity would relieve. It is now, however, I think, well settled that such is not the case: Wallingford v. Mutual Society, 5 App. Cas. 696; Protector Endowment Co. v. Grice, 5 Q. B. D. 592.

In Graham v. Ross, 6 O. R. 154, Hagarty, C.J., said: "I was under the impression that it was now considered clear in

this province that equity would not now relieve against such a proviso, but I cannot now refer to the authority."

In Sterne v. Beck, 1 DeG. & S. 595, Lord Justice Knight Bruce said: "To a proviso of such a nature none of the principles of equity relating to relief in the case of penalties are, in my opinion, applicable." See also Wilson v. Campbell, 15 P. R. 254.

Bell & Dunn on Mortgages, p. 80, give it as their opinion that "it is now well settled that such a provision is to be regarded as the contract of the parties, and not in the nature of a penalty against which relief will be granted." See also Coote on Mortgages, p. 144; Leeds v. Broadbent, [1898] 1 Ch. 343; and Tylee v. Hinton, 3 A. R. 60.

If the action had been brought upon the covenant alone, counsel for the defendant admitted that he would not be entitled to relief. In this case the action is properly framed as an action upon the covenant, and the plaintiffs ask for judgment against the defendant for the total amount of their claim as in personal action, but they also ask for foreclosure is default of payment. The judgment entered is upon the covenant alone, and in the order permitting them to sign judgment no leave is reserved to proceed for the relief by way of foreclosure. It was at one time held in Ontario that a plaintiff might be given leave to sign judgment for his money demand and be allowed to proceed for another claim which he had united with a money demand under Rules after which the Manitoba Rules are modelled: Hay v. Johnston, 12 P. R. 596. That case, however, was expressly overruled in Solmes v. Stafford, 16 P. R. 264. It was there held that a motion for summary judgment under their Rule 739, which is the prototype of our Rule 602, could not be made if any part of the claim was not the subject of a special indorsement under Ontario Rule 245. The new Ontario Rule 603 brought the practice back into conformity with that laid down in Hay v. Johnston and Mackenzie v. Ross, 14 P. R. 299.

Whether or not our Rules, beginning with 602, permit that course to be followed, I am not at present considering.

Such cases as Knapp v. Cameron, 6 Gr. 559, McLaren v. Miller, 20 Gr. 637, and Gemmell v. Burn, 7 P. R. 381, shew that in Ontario the practice was to grant relief under Chancery Order 462 in cases where the mortgage money had become due pursuant to an acceleration clause. The wording of that Order is exactly the same as our Rule 278. At that time a provision for accelerating payment was regarded as

a penalty. I do not gather from these decisions that they went upon that ground, and yet I do not see how they can be applied to this case if the acceleration clause is not to be treated as a penalty. The action is, I think, one of foreclosure within the meaning of Rules 277 and 278, so that they in terms apply to it. Relief under them can be granted only "upon paying into Court the amount then due for principal, interest, and costs." According to the contract of the parties, the amount due is the whole amount secured by the mortgage. It is not possible to give relief upon payment of the overdue instalment only, unless it be held that the parties are not bound by the terms of the acceleration clause in the mortgage. The authorities seem to me fairly clear that such a provision is not a penalty against which relief will be granted, but the contract of the parties by the terms of which they must abide.

The question of whether or not sec. 117 of the Real Property Act would apply to this case was not argued, but I have considered it, and I have come to the conclusion that it does. That section provides that "in case default has occurred in making any payment due under any mortgage . . . and under the terms of the mortgage by reason of such default, the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provision to the contrary, and at any time prior to sale or foreclosure . . . pay such arrears as may be in default under the mortgage, together with costs to be taxed by the district registrar, and he shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become due and payable by reason of lapse of time."

The mortgage in this case is an old system mortgage, and the dufficulty I have experienced has been in deciding whether or not this clause applies to such a mortgage. The language of the section itself is as wide as it well could be In the interpretation clauses, whilst "mortgagee" is confined to the owner of a mortgagee registered under the Real Property Act, "mortgage" and "mortgagor" are not so limited. The rights of mortgagees upon default are dealt with in secs. 109 to 118, and all of them, with the exception of 117, are, either expressly or by implication, limited to mortgages registered under the new system. No inference can be drawn from the fact that this section is found in an Act dealing

with a new system of land registration. The earliest Real Property Act dealt with matters of general law in no way connected with the registration of title to land. For example, the devolution of estates was dealt with by those Acts. An explanation of the reason why sec. 117 should be made to apply generally to all mortgages is not far to seek. There are a large number of old system mortgages upon land afterwards registered under the new system, and it may well be that the legislature intended to make the rights conferred by sec. 117 apply equally to both systems. It would be difficult to assign a reason why a mortgagor under one system should be entitled to relief against an acceleration clause and a mortgagor under the other system not to be so entitled. Where the language used justifies that conclusion, I think I must assume that the legislature meant the rights of mortgagors under such circumstances to be uniform.

As I think the Referee's order right, though not upon the ground upon which it was made, I dismiss the appeal without costs.

MANITOBA.

MACDONALD, J. MARCH 18TH, 1908.

TRIAL.

VOSPER v. AUBERT.

Vendor and Purchaser—Contract for Sale of Land—Purchase Money Payable by Instalments—Default—Acceleration Clause—Action to Recover whole Purchase Money or in Default for Cancellation—Default by Vendor — Purchaser relieved on Terms.

Action by a vendor to recover the purchase money of land and in default for cancellation of the agreement of sale and purchase, foreclosure of the purchaser's equity, and possession of the land.

H. A. Robson, for plaintiff.

A. J. Andrews, for defendant.

MACDONALD, J.:—The plaintiff by agreement of sale, dated 7th June, 1906, sold to the defendant 625 acres of land in the parish of St. Francois Xavier for $17,500;; $1,000 being payable on the execution of the agreement, and the balance in yearly instalments with interest at 6 per cent.

The purchaser also agreed to pay all taxes, rates, and assessments wherewith the land might be rated or charged, from and after 1st June, 1906, and if the vendor paid said taxes the same were to be added to and become part of the purchase money and should be payable forthwith and should bear interest at the rate aforesaid.

The agreement further provided that on default in payment of any instalment of either purchase money or interest, the whole of the purchase money and interest thereby secured should at once become due and payable.

Owing to some difficulty over the title to the property, the agreement was not completed until 8th November, 1907, the first payment of purchase money not having been in the meantime made. On the date last mentioned the agreement of sale was completed, each party getting a duplicate signed by the other; $957.60 on account of the first instalment of purchase money was paid by the defendant to the plaintiff, the balance of the $1,000 remaining unpaid. On this date there was also past due the second instalment of purchase money, and the defendant made default in payment of taxes for the years 1906 and 1907, amounting to $108.74—the 1906 taxes having been paid by the plaintiff prior to the completion of the agreement, and the 1907 taxes on the same day that he brings this action.

It is admitted by both parties that, prior to the completion of the agreement by delivery, an agreement was arrived at extending the time for payment of the second instalment of purchase money. The parties, however, disagree as to the terms of this agreement; the defendant says that he was to pay $200 on 1st December and the balance of arrears at the end of December or beginning of the new year, and he is corroborated by his solicitor; the plaintiff, on the other hand, says that $300 was to be paid at once, and the balance on 1st December. This parol agreement would contradict the writing, and would, in consequence, be inadmissible. It was not a condition precedent to the completion of the agreement,

and it was, therefore, without consideration, and plaintiff is not legally bound under it.

By reason of the default in payment of the balance of the deposit and of the second instalment of the purchase price, the plaintiff, under the terms of the acceleration clause in the agreement, demands payment of the full balance of the purchase price, and, in default thereof, that the equity of redemption in the said lands may be forever foreclosed and the said agreement cancelled and declared to be at an end, and recovery of possession of the said lands.

The defendant prays that upon payment of all arrears due under the agreement, he may be released from all penalties and forfeitures, and that his default, if any, may be condoned, and that the agreement may be ordered to be carried out and performed as originally provided, and that the clause in the agreement providing for payment of the whole of the purchase price of the said lands upon default may be relieved against.

It seems well settled that the provision in a contract that, upon default in payment of any instalment, the full balance or amount secured thereunder shall become due and payable, is not in the nature of a penalty, and, if the defendant was in default, he would clearly not be entitled to the relief he seeks. The clause in question is a part of the agreement solemnly entered into between the parties, and I do not think this Court can say: "True, you have made this agreement, but you did not mean to be bound by it, and you will therefore be relieved from the effect of it."

The defendant has not to pay any greater sum than the sum originally agreed to be paid, if the terms of the agreement be strictly observed; he is not subjected to any penalty, and where the intent is not to secure a sum of money, or the attainment of a collateral object, equity does not relieve: Protector Endowment Loan and Annuity Co. v. Grice, L. R. 5 Q. B. 592.

In Wallingford v. Mutual Society, 5 App. Cas. at p. 705, Lord Blackburn says: "The agreement between the parties was, and it is obvious that what they meant to agree was, that the £6,000 and the £5,000 odd in addition as the premium, shall be a debitum in præsenti payable by instalments, if the instalments are punctually paid; but, if there be a de-

fault in payment, then all is to be paid at once. That being the contract between the parties, that is not the case of a penal sum."

At the time of completion of the agreement, by delivery, the full $1,000 deposit called for by its terms was not paid, and there was also another instalment of purchase money past due, and it is by reason of these non-payments that the plaintiff claims the benefit of the acceleration clause referred to. So far as these payments were concerned, the agreement was impossible of performance, and, although there was no valid agreement by which the time of payment of these amounts then due was extended, surely the plaintiff waived his right to call in the full balance of the purchase price because of amounts past due at the time of completion of the agreement being under its terms in arrears.

Furthermore, the plaintiff has himself made default in carrying out the terms of the agreement. He was to place a mortgage on the property to secure a loan approximating $10,000, repayable in 5 years and at a rate of interest not exceeding 7 per cent. This mortgage was to be assumed by the defendant on 1st May, 1912. Had this mortgage been a charge upon the property, the purchase price due the plaintiff would, to the amount of such mortgage, be reduced, and before the plaintiff would be entitled to the relief sought, he should perform all the terms of the agreement on his part to be performed.

I think the defendant, under the circumstances of the case, is entitled, upon payment of all arrears of the purchase price and interest and the costs of the action, to have the agreement carried out as originally provided, the amount so due to be paid within 10 days from the taxation of the plaintiff's costs, and in default of payment within that time the plaintiff to have judgment for the full amount claimed in his statement of claim, together with costs, and in default of payment within 6 months, that the equity of redemption in the said lands be foreclosed and the agreement cancelled and at an end, and the plaintiff to have immediate possession of the lands.

MANITOBA.

MACDONALD, J. MARCH 3RD, 1908

TRIAL.

ELVIN v. CLOUGH.

Principal and Agent—Agent's Commission on Sale of Land —Contract for Payment of Commission—Vendor and Purchaser Brought together by Agent's Procurement — Evidence.

Action for commission on sale of hotel property.

W. F. Hull and J. E. McAllister, for plaintiffs.

T. L. Metcalfe and D. A. Stackpoole, for defendant.

MACDONALD, J.:—The plaintiffs are brokers carrying on business as "The Locators," and sue for commission on the sale of the defendant's hotel property at Gilbert Plains. Under the agreement between them (exhibit 1) the defendant agrees to pay the plaintiffs a commission an any sale effected directly or indirectly by them of 5 per cent. on the first $2,000 and 2½ per cent. on the balance, to be paid out of the first payment, and he also agrees to notify the plaintiffs immediately a sale has been made and to give 10 days' notice before withdrawing the property from sale..

Shortly after the making of this agreement and on the same day the plaintiffs met one John Forrest, who wanted to purchase a hotel, and this property was described to him and particulars of sale fully discussed. Forrest having a friend at Gilbert Plains (the witness Arthur Sheppard) wrote him for particulars about the hotel, and in this letter he mentioned "The Locators" as the brokers through whom he learned of the property. Sheppard on its receipt called upon the defendant and got the particulars desired by Forrest. He says he shewed this letter to the defendant. This the defendant denies, and states that "he did not know who the party was until Forrest wrote him a few days afterwards." In this letter Forrest wanted the defendant to take as part payment on the sale of the hotel a farm owned by him at

Plumas. The defendant did not reply, and in the month of May, 1907, Forrest went to Gilbert Plains with a view of purchasing. He urged the defendant to accept the farm referred to as part payment, and in the course of their negotiations stated that from the fact that he had no commission to pay on the sale he could afford to take the farm. The witness Forrest says, in referring to defendant and himself, "We were both willing to take chances at getting ahead of the Locators." I told him I got this from the Locators with several others, and that they would not remember it and he would not have to pay a commission." This the defendant denies, and I accept his evidence in preference to that of both the witnesses Sheppard and Forrest.

The evidence convinces me that the friends Forrest and Sheppard suppressed the names of the Locators. Sheppard was in expectation of a commission on the sale—he would not call it a commission, but says, "I thought there was something in it," and after the deal was closed he tried to get some money from the defendant.

The witness Forrest also informed the defendant that Sheppard was claiming a commission, and suggested that they should each pay him $25. This the defendant refused, asserting that there was to be no commission, to which Forrest replied that he (Sheppard) could make trouble, and he then for the first time advised him that he had got the property through the Locators. No commission being forthcoming to Sheppard, he evidently thought he would get even with the defendant, and wrote the Locators to take proceedings against him.

The defendant had himself on 5th May, 1907, advised the plaintiffs of the sale. If he knew that Forrest came from them and he was a party to defeat their claim to a commission, is it likely he would do so?

I find that the defendant did not know that Forrest came from the Locators, and that he was not told so by either Forrest or Sheppard; that he was deceived by Forrest, and made the sale on the supposition that the friend Sheppard was the medium through whom they came together.

But, notwithstanding these facts, is the defendant relieved from liability to the plaintiffs under the agreement, exhibit 1? They were not parties to the deceit of Forrest and Sheppard; they certainly were the means of the vendor and pur-

chaser coming together, and the agreement calls for a commission on sale made directly or indirectly. A sale was made, and the plaintiffs are entitled to recover their commission.

There will be a verdict for the plaintiffs for $425 and costs.

MANITOBA.

MATHERS, J. MARCH 25TH, 1908.

TRIAL.

HAFFNER v. CORDINGLEY.

Principal and Agent—Agent's Commission on Sale of Land —Contract to Pay Commission—Construction—"Completion of the said Sale"—Execution of Binding Agreement—Terms not Carried out.

Action for a commission on the sale of land.

J. H. Munson, K.C., and E. F. Haffner, for plaintiffs.

A. J. Andrews and M. G. Macneil, for defendants.

MATHERS, J.:—A dispute arose between the defendant C. H. Cordingley and the plaintiffs as to their right to a commission on the sale of lots 57, 58, and 59 of the outer two miles of St. Boniface. The amount claimed by the plaintiffs as payable was $5,000. The defendants denied that the plaintiffs were entitled to anything, but finally a compromise was arrived at by which the amount to be paid was fixed at $2,000. The following document was then drawn up and signed:—

"Winnipeg, Man., 11th February, 1907.

"John Haffner & Son,
"City.

"Gentlemen: In connection with the sale of parish lots 57, 58, and 59 of the parish of St. Boniface, outer two miles, from Mrs. Cordingley and myself to John A. Lock et al., I hereby agree that on the completion of the said sale I will pay your firm a commission of $2,000. This amount to be paid whether I retain an interest in the said land myself or

not. This amount to be paid on completion of the deal. I am acting in this matter for Mrs. Cordingley and myself.

"Yours truly,

"C. H. CORDINGLEY.

"J. HAFFNER & SON."

When this document, which I shall hereafter refer to as "the letter," was signed, the purchaser had made a deposit of $2,000, but no agreement had been executed, nor had the terms of the purchase been settled beyond the fact that $35,000 was to be paid in cash, when the agreement was executed, and the balance in 3 annual payments. A few days afterwards the formal agreement to purchase was executed by all parties, containing the usual covenant for payment. By it the payment to be made upon execution of the agreement was fixed at $10,000, and a further sum of $25,000 was to be paid on 1st March following, without interest.

The cash payment of $10,000 was made at the time of the execution of the agreement, but the purchaser defaulted in the payment of the $25,000 on 1st March. On that day he paid, however, $5,000, and obtained an extension of time to 1st July for the balance. Subsequently a further sum of $5,000 was paid, but nothing more, and on 10th October the defendants took back the land and released the purchaser from all obligation under the agreement. The coutention of the plaintiffs is that their commission became payable on the execution of the agreement of sale. The defendants, on the other hand, say it was not to become payable until the sale was carried out, and, as the sale has not been and never can be carried out, without any default on their part, the plaintiffs have no claim.

I must interpret the document and the words used in it in the sense in which I think the parties intended them to be understood, as gathered from the document itself and the surrounding circumstances. Decided cases are of very little assistance in the construction of documents. Even where the document is exactly in the same terms, the circumstances surrounding it may be so absolutely different as to give the document itself an entirely different meaning. For that reason whilst I have read the cases to which I was referred by counsel, I have not thought it necessary to refer to any of them here.

Applying this rule of interpretation, I have come to the conclusion that what the parties meant by the words "com-

pletion of the sale" and "completion of the deal" in the above quoted document was the execution of a binding agreement of sale.

There will be judgment for the plaintiffs for $2,000 and interest at 5 per cent. from 15th February, 1907, and costs of suit.

MANITOBA.

MATHERS, J. MARCH 28TH, 1908.

CHAMBERS.

EMPEROR OF RUSSIA v. PROSPOURIAKOFF.

Attachment of Goods — Absconding Debtors — Action for Money Demand—Jurisdiction of Court—Cause of Action —Foreigners—Domicile — Rules 201, 202—Tort—Conversion of Money abroad—Detention in Manitoba—Contract—Motion to Set aside Order of Attachment—Extension of Time for Moving—Order Set aside—Order for Detention of Goods pending Trial—Rule 894—Goods the Subject of Action—Claim to Specific Chattels—Terms and Conditions—Stay of Proceedings.

Application by defendants to set aside an order of attachment by which certain goods, said to be those of the male defendant, had been seized by the sheriff and were then in his custody.

A. B. Hudson and E. R. Levinson, for defendants.

J. E. O'Connor and H. P. Blackwood, for plaintiff.

MATHERS, J.:—The statement of claim alleges that the male defendant was formerly the treasurer of the department of the interior of the Russian government in the province of Turkestan, and that during his term of office he received, as such treasurer, certain sums of money in roubles, the equivalent of over $160,000 in Canadian currency, which money he stole or embezzled and appropriated to his own use, and refused and still refuses to account to the plaintiff therefor. And the plaintiff claims recovery thereof and interest both as

damages for the defendant's wrongful act and as money had and received to the plaintiff's use.

The statement of claim further alleges that out of the said moneys the male defendant purchased certain lands and premises situate in the province of Manitoba and procured a conveyance thereof to be made to the defendant Zeman. This was done, it is alleged, as the defendant Zeman well knew, in order to prevent the plaintiff recovering said lands or the money which they represent and for the purpose of defrauding the plaintiff.

It is also alleged that the defendants have, out of the said moneys, made large purchases of goods and chattels which are now in the city of Winnipeg or elsewhere within the jurisdiction of this Court.

Briefly, the relief asked is, so far as necessary to state it, payment of the sum of $160,000 or whatever amount it may be found that the defendants appropriated, interest, an account of all moneys received by the defendants for or for the use of the plaintiff, an order for the delivery to the plaintiff, or for the sale of the said goods and chattels, and for payment of the proceeds to the plaintiff, a declaration that the defendants have no claim to the said lands as against the plaintiff, and further relief.

On 24th January, 1908, an order of attachment was obtained from the Referee, directed to the sheriff of the eastern judicial district, directing him to attach, seize, and safely keep all the personal property, &c., of the defendants to secure and satisfy a debt of $160,000.

This order was issued upon an affidavit in which it was sworn, inter alia, that the deponent had reason to believe that the defendants had departed from Manitoba to avoid being arrested or served with process or with intent to delay, defeat, or defraud their creditors, of whom the plaintiff is one; and that the defendants are not a corporation, and have not been domiciled within the jurisdiction of this Court, as he is informed and believes.

Upon the motion coming before me for argument, I permitted the plaintiff's counsel to file and read 5 additional affidavits, under Rule 427. It was objected on behalf of the plaintiff that the application was not made within 4 days after the attachment order came to the knowledge of the defendants, as required by Rule 438. I held this objection fatal, but upon application of the defendants' counsel I made an order extending the time under Rule 385.

The motion was then argued on the merits.

Of the 5 affidavits filed by the plaintiff during the argument, I only find it necessary to refer to two. One of them by Nicholas de Struve, Imperial Russian Consul for Canada, repeats the statement that the defendants are not domiciled within the jurisdiction of this Court. The affidavit of George Dovis Granberry shews that the defendants left the city of Winnipeg just before Christmas, 1907, and have not since returned, and that, after inquiry, he has failed to ascertain where they are. He concludes by deposing that he has good reason to believe and does verily believe that the defendants have departed from Manitoba to avoid being arrested or served with process or with intent to delay, defeat, or defraud their creditors.

The facts material to this application, as they appear from the affidavits read before me, are as follows. Both the plaintiff and the defendants are foreigners. The cause of action arose in Russia. The defendants were not domiciled in Manitoba. They had for a time resided in Manitoba, but had ceased to reside in this province before the action was commenced. It is not disputed that this Court has jurisdiction as to that portion of the plaintiff's action which seeks the recovery of land, and in so far as he seeks to recover specific goods this Court may also have power to afford relief. In so far as the plaintiff seeks to recover upon a money claim against the defendants, the facts do not bring this case within Rule 201, or any of its sub-sections. It is not a case, therefore, in which the statement of claim could be served out of the jurisdiction, because, apart from the statute, a Court has no power to exercise jurisdiction beyond its limits. The Rules as to service out of the jurisdiction were intended to form a complete code on the subject, and to shew when such could and when it could not be effected: Bansfield v. Whalley, 32 Ch. D. 131;; Field v. Bennett, 3 T. R. 239.

It was attempted to bring the case within clause (e) of Rule 201, as based on a tort committed within Manitoba. The conversion of the money took place in Turkestan, but it is said it was a tortious act to detain it here, and hence there was a tort committed in Manitoba. I do not agree with that contention. Before it can be said that a tort was "committed" in Manitoba, it must be established that the wrongful act or omission of the tort-feasor which caused the injury to the plaintiff took place in this province: Anderson

v. Nobels Explosive Co., 12 O. L. R. 644, 8 O. W. R. 439, 558, 644.

It was also argued that, apart from Rule 202, the possession by the defendants of property in Manitoba gives this Court jurisdiction over the defendants in an action in personam. That contention is effectually disposed of by the recent decision of the Court of Appeal in England in Emanuel v. Symon, [1908] 1 K. B. 302.

The power which a Court has to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction, has been dealt with in a number of cases, beginning with Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670, and in all of them it has been held that such power does not exist unless the person proceeded against has appeared to the process or has expressly agreed to submit to the jurisdiction of that Court: Deacon v. Chadwick, 1 O. L .R. 346; Vézina v. Will H. Newsome Co., 14 O. L. R. 658, 10 O. W. R. 17; Emanuel v. Symon, supra; and Walsh v. Herman, ante 388.

No attempt was made to bring the case within Rule 202. Had there been evidence that the defendants were possessed of property in Manitoba to the value of $200, it would have been necessary to consider whether or not, under that Rule, leave to serve the statement of claim out of the jurisdiction should not have been obtained before the statement of claim was issued: Gullivan v. Cantelon, 16 Man. L. R. 644, 5 W. L. R. 469; and also whether or not the duty which the law imposes upon a person who has stolen or misappropriated money to return it to the person to whom it belongs, and enables the injured party to recover it as money had and received for his use, constitutes a contract within the meaning of that Rule: Bullen & Leake, 5th ed., p. 293, and cases cited; Ehrensperger v. Anderson, 3 Ex. 147; Chowne v. Bayles, 31 Beav. 351; and Appleby v. Franklin, 17 Q. B. D. 93.

In my opinion, there was no jurisdiction to issue the order of attachment, and it must be set aside with costs in the cause to the defendants in any event, and the usual protection to the sheriff.

In the event of this conclusion being arrived at, I was requested by plaintiff's counsel to make an order for the detention of the goods pending the trial of the action under Rule 894. In a vague kind of a way the goods are, I think, made the subject of the action within the meaning of this Rule. I am far from satisfied that the plaintiff can succeed in estab-

lishing a claim to these specific chattels, even if the Court has jurisdiction to entertain the claim, a point on which I have considerable doubt. As counsel for the defendants seemed to think the jurisdiction does exist, I do not propose to examine the question here; and I should not now try the plaintiff's claim.

An order will go for the detention of the goods by the sheriff, upon the condition that he insure them to their full insurable value, and that the cost of detaining, storing, and insuring them be always kept paid by the plaintiff one week in advance, so that, in the event of the plaintiff failing to establish his claim, the goods may be restored to the defendants free from claims for storage or detention, or, in the event of their destruction, that the insurance moneys may be so restored. In the event of the condition not being at all times performed, the sheriff will withdraw from possession and deliver the goods to the defendants. So long as the condition is performed, the sheriff will hold the goods until further order.

I reserve the right to either party to apply at any time to vary or rescind this order of detention.

I grant a stay for two weeks, upon plaintiff's counsel undertaking in the meantime to pay the costs of storing, detaining, and insuring the goods.

BRITISH COLUMBIA.

LAMPMAN, Co. C.J. MARCH 3RD, 1908.

COUNTY COURT OF VICTORIA.

DUCK v. DANIELS.

Principal and Agent—Agent's Commission on Sale of Land —Dispute as to Employment of Plaintiffs as Agents — Evidence—Purchaser Found by Plaintiffs—Sale Negotiated apart from Plaintiffs—Right to Commission.

Action for commission on sale of land.

R. T. Elliott, K.C., for plaintiffs.

W. J. Taylor, K.C., for defendant.

LAMPMAN, Co. C.J.:—The plaintiffs are real estate agents carrying on business in Victoria, and the defendant is a farmer who, in April last, owned a farm on the Carey road, which he wanted to sell for a price to net him $14,500, and with that object in view he listed it with many different real estate firms in Victoria before 13th April. Up to 13th April the plaintiffs and defendant had had nothing to do with each other, but on that day Mr. T. A. Johnston, who is employed by the plaintiffs, drove out into the country in company with Mr. E. H. Anderson, who was looking for opportunities to buy real estate. The defendant had a "for sale" sign up, and, directed by it, Johnston went to the house and saw defendant. Johnston says they talked about the number of acres, fruit trees, etc., and that he told him he represented the plaintiffs, whose business card he gave to defendant, and asked defendant to let plaintiffs have the farm for sale, the price being $15,000, and the defendant agreed and said he would pay 5 per cent. commission; that before the conversation was finished Anderson joined them, and, in reply to Anderson's inquiry as to price, defendant said $15,000, less 5 per cent. commission.

Anderson gave evidence and said that after Johnston had been at the house some considerable time he went in, and he heard defendant say the price was $15,000, and that Johnston then said "Will you allow 5 per cent. commission?" and defendant said, "Yes."

Johnston says that later he knew that Mr. Van Decar was desirous of buying some country property, and he arranged to drive him out into the lake district, and on 1st May he did drive Mr. and Mrs. Van Decar out, and the first place stopped at was that of the defendant, whom they saw, and to whom they talked about the place, and that the price of $15,000 was mentioned; that later on, 6th May, he took Mr. Underwood (a retired lieutenant in the British army) out to shew him the property with a view to selling to him, but defendant then said he had taken the farm off the market, as the price was too low, and that he would re-list it with plaintiffs in case he again put it on the market, but at an increased price.

Mr. Underwood gave evidence, and entirely corroborated what Johnston says, and he was not cross-examined. The defendant denies that he ever appointed plaintiffs his agents, and says he expressly refused Johnston's request to do so: he says that on the occasion of Johnston coming to his

place with Anderson the latter never spoke to him and never got out of the rig; he also denies that Johnston gave him plaintiffs' business card.

Mr. Van Decar says that he and Johnston, whom he knew as trying to sell real estate, had some talks about real estate in the country, and on 1st May Johnston hired a carriage and drove him and his wife out the Carey road, and defendant's was the first place they stopped at; they did not get out of the carriage, but stayed there 10 or 15 minutes talking with defendant, whom he asked how long the orchard had been set out; they then drove around the country looking at other properties, and on the way home Johnston told him he thought the defendant's place at $15,000 was the best buy of the lot. Next day he says that he and his wife decided to have a look round without Johnston, so they drove out, and, after seeing other places, they went and saw defendant at his place; he says he asked defendant if the place was listed with Johnston, and defendant said "no," so he said he would deal with defendant direct and thus save the commission which he would have to pay in case defendant sold through an agent; they then agreed on a price; but before finally closing defendant wished to withdraw his place from sale with the agents with whom he had listed it.

The sale for $14,250 to Van Decar eventually went through, as arranged on 2nd May between him and defendant, and the plaintiffs now say they were defendant's agents, and brought about the sale, and claim $750 commission.

The defence is, as already indicated, that plaintiffs never had any authority to act for defendant. On the evidence I can only come to the conclusion that plaintiffs were defendant's agents. Johnston swears they were: Anderson, who has no interest one way or the other, gives evidence which I think is favourable to plaintiffs, and in some matters he is flatly contradicted by defendant. Underwood, who is another independent witness, says defendant said if he put the property on the market again he would re-list it with plaintiffs: it is a fair inference that he at one time had it listed with plaintiffs.

I cannot disregard the evidence of these independent witnesses. The defendant is very deaf, and Mr. Taylor suggested that some mistake or misapprehension may have occurred because of his client's inability to hear the different

conversations, but, unfortunately for his client, it is not so much what he heard as what he said which tells against him.

There is no question that on 2nd May Daniels and Van Decar reached an understanding, but on 6th May we find him telling Johnston and Underwood that his place was not on the market, as the price of $15,000 was too small. According to the certificate of the Registrar-General, he only received $14,250 for the farm. He was probably correct in saying the place was off the market, as it was sold, but why did he not tell Johnston the truth and say it was sold or was as good as sold to Van Decar? It looks as though he was trying to stave off a claim for commission by Johnston.

I find that defendant appointed plaintiffs his agents to sell at $15,000, and agreed to pay them 5 per cent. commission, and that the sale to Van Decar at $14,250 was brought about by plaintiffs' act.

It was argued that because the sale was for less than $15,000, the plaintiffs were not entitled to any commission. In Wolf v. Tait, 4 Man. L. R. 59, where the plaintiff, who was employed by the defendant to sell for him certain lands at $250 per acre, introduced to defendant a prospective purchaser, who eventually, after negotiations with defendant conducted largely apart from plaintiffs, purchased at $210 per acre, the full Court held that plaintiff was entitled to commission. In Oetzmann v. Emmott, 4 Times L. R. 10, Mr. Justice A. L. Smith says the rule of law is that laid down by Chief Justice Erle in Green v. Bartlett, 32 L. J. C. P. 261, namely, that if the relation of buyer and seller was really brought about by the act of the agent, the agent was entitled to his commission, even though the sale was not actually carried out by him.

Judgment for plaintiffs against the defendant for $712.50 and costs.

At the trial it was suggested by Mr. Taylor that I should reserve my judgment until the full Court gave its decision in Bridgman v. Hepburn. My judgment, with the exception of this paragraph, was written before the judgment in Bridgman v. Hepburn was delivered, and after a perusal of the latter I can see no reason to alter mine.

BRITISH COLUMBIA.

CLEMENT, J. MARCH 9TH, 1908.

TRIAL.

JENNS v. OPPENHEIMER.

Company—Moneys Paid to Executors of Deceased President —Secret Trust—Action to Divert Moneys into Treasury of Company—Status of Plaintiff as Shareholder and Creditor—Parties—Company not before Court—Leave to Add in Master's Office — Distribution of Moneys — Reference—Practical Winding-up.

Action by a shareholder and creditor of the Westminster and Vancouver Tramway Company, on behalf of himself and all other creditors and shareholders of the company, for a declaration that certain moneys received by the defendants the executors of David Oppenheimer, deceased, were the moneys of the company, and for consequent relief.

Reid, K.C., for plaintiff.

J. Martin, K.C., for defendants the executors.

Wilson, K.C., for defendant Lena Oppenheimer.

CLEMENT, J.:—During 1894 and until the spring of 1895 the late David Oppenheimer was the president and managing director of the Westminster and Vancouver Tramway Company. The company were in financial difficulties, and prior to September, 1894, possession had been taken of the company's lines by debenture holders, who afterwards (in 1895), under appropriate powers, sold the whole of the company's assets. By reason of these proceedings the company became in all but a strictly legal sense defunct. No meetings have since been held; the directors are with one or two exceptions dead; the books and papers of the company, which were handed over to the purchasers of the company's assets, have all disappeared with the exception of a stock journal, stock ledger, and a list of the shareholders in July, 1893.

David Oppenheimer died in 1897. In September, 1901, his executors (defendants in this action) began action against

H. R. Sperling and others (said to be the real purchasers of the assets of the Westminster and Vancouver Tramway Company) claiming fulfilment, in effect, of an alleged agreement of September, 1894, to pay or compensate David Oppenheimer for services rendered by him to them. That action was compromised on 12th December, 1903, by the payment by the defendants therein to the executors of David Oppenheimer of the sum of $50,000. The instrument of compromise shews that that sum was received by the executors in settlement of the claim put forward by them in that action. They cannot be heard to suggest otherwise, and, indeed, Mr. Sweeny in his evidence did not suggest otherwise. I need not therefore discuss the question how far pleadings in one action are to be received in another as evidence against the party pleading. This fund is by the instrument of compromise ear-marked as a fund received by the executors for certain specified services rendered by David Oppenheimer, and, as I have intimated, his executors cannot be heard to suggest that the facts put forward as the basis of the claim were in fact false. What then were the services rendered? They are set out pretty fully in the statement of claim in Oppenheimer v. Sperling, as reported in 10 B. C. R. 162. Shortly stated, the story is that David Oppenheimer "interested himself in the reconstruction of the said companies—" i.e., the company above mentioned and another—and so brought about the purchase by Sperling et al. of the assets of the Westminster and Vancouver Tramway Company as preliminary to or as part of the scheme of reconstruction. For these services the purchasers agreed to hold in trust for David Oppenheimer a large block of stock in the newly formed company. The fact that David Oppenheimer, at the time this agreement was entered into with Sperling et al., was president and managing director of the Westminster and Vancouver Tramway Company, does not appear upon the pleadings in Oppenheimer v. Sperling. But, adding that fact to what does appear, it seems to me almost too clear for argument that anything received by David Oppenheimer on that agreement belongs to the company of which he was the managing director. It does not appear whether Sperling et al. knew of David Oppenheimer's position in the Westminster and Vancouver Tramway Company or not. If they did, and if the agreement by them to hold the stock in the new company in trust for David Oppenheimer was entered into in order to keep the trans-

action secret, they must share the odium which justly attaches to such a bargain. It seems idle to say that the company lost nothing. What David Oppenheimer was to receive was part of the price which the purchasers were willing to pay. Of this agreement the company knew nothing, and the plaintiff learned of it only upon seeing the report of the case of Oppenheimer v. Sperling in 10 B. C. R. 162. If the attitude of the executors really mirrors David Oppenheimer's intention, he intended to appropriate the fruits of his bargain—i.e., part of the price paid—to his own personal use, to the exclusion of the creditors and shareholders of the company. That the stock was to be held in trust and not issued openly does point to such an intention on the part of David Oppenheimer. Mr. Wilson urged with some show of feeling that this action was a slander upon a dead man. To my mind, it is the dead man's executors who have put this stigma upon his memory, by claiming and accepting, in the interest of his estate alone, fulfilment of the agreement. It may be that David Oppenheimer would have done "the fair thing" by his old associates had he received his reward in his lifetime; his executors refuse to do it except under legal compulsion. That the law does compel restitution in just such cases as this is clear upon the authorities. They are a host, and Archer's Case, [1892] 1 Ch. 322, may be referred to for the line of cases.

But it is said that this plaintiff, suing on behalf of himself and all other creditors and shareholders of this practically dead company, cannot maintain the action, first, because it is not shewn by proper evidence that he is either a shareholder or creditor, and, secondly, because the company itself is the only proper plaintiff in such a case as this, and is not before the Court as plaintiff or even as defendant.

As to the first point, it sufficiently appears that the plaintiff is a shareholder. His position as such—as the beneficial owner at all events of some hundreds of shares—is sworn to by himself and corroborated by documentary evidence, and the company's books produced shew that he is the holder of one share, at least, under certificate issued 26th May, 1890: see stock ledger p. 16. He is also a judgment creditor, and the objections to the proof of that fact I should hold untenable if it were necessary to pronounce upon them; but his sure position as a shareholder makes that unnecessary.

As to the second point, it seems to me sufficient to say that Burland v. Earle, 71 L. J. P. C. 1, is a decisive authority against the defendants' contention that only at the instance of the company itself can the relief sought for in this action be obtained. In the recent case of Normandy v. Ind., 77 L. J. Ch. 82, at p. 89, Kekewich, J., speaks of this question as one going to the root of the action, and later on refers to the judgment of Lord Davey in Burland v. Earle, ubi supra, as "merely repeating in concise and forcible language what has been stated again and again in other judgments." I need, therefore, do no more than refer to Lord Davey's judgment for an exposition of the principles involved. The more important point is the application of those principles to the facts of that case. Stated shortly, the Court, at the instance of one shareholder in a company, enforced as against another shareholder who was president and manager of the company) restitution of moneys improperly received by him by way of increment to his fixed salary. The company, it is true, was a party defendant in that action, but that fact would not weaken the force of the objection that no cause of action was shewn in the plaintiff—an objection which, as intimated above, would go to the root of the action. Clearly, therefore, their Lordships of the Privy Council were of opinion that there was a right of action in the plaintiff, and if in that case then equally in this. I can see no difference whatever in principle. The company in that case supported its president; perhaps the company in this case would, if resuscitated, disavow the plaintiff's action and support the executors of its dead president in the stand they take. That could not affect the plaintiff's right, whether as shareholder or creditor, to participate in this fund. The action is well constituted, in my opinion, and it will be sufficient to have the company before the Court in the Master's office under the reference I propose to order in this case.

The plaintiff is entitled to a declaration that the moneys received by the defendant's executors from Sperling et al. were and are assets of the Westminster and Vancouver Tramway Company, and to an order that those moneys, with legal interest, be paid into Court to abide the result of the reference there. The reference will practically be a winding-up proceeding, that is to say, the inquiries will be the usual inquiries under a winding-up order. The company not being technically or otherwise before me, I cannot

pronounce such an order; and it is not for the Court, perhaps, to indicate what should be done. I can only reserve leave to move for whatever order may be necessary to make the company a party defendant in the Master's office.

The plaintiff is entitled to his costs up to and inclusive of this judgment. Further directions and subsequent costs reserved.

BRITISH COLUMBIA.

HUNTER, C.J. MARCH 10TH, 1908.

TRIAL.

ESQUIMALT AND NANAIMO R. W. CO. v. FIDDICK.

Constitutional Law—Vancouver Island Settlers' Rights Act, 1904—Intra Vires — Crown — Provincial Government—Grant of Land—Validity—Grant of Minerals and Timber by Dominion Government—Locus Standi of Plaintiffs to Attack Grant to Defendant — Absence of Assent by Crown—Costs—Defendant Indemnified against Costs.

Action brought to determine the validity of a Crown grant purporting to have been issued to the defendant under the authority of the Vancouver Island Settlers' Rights Act, 1904.

E. V. Bodwell, K.C., and A. P. Luxton, K.C., for plaintiffs.

A. E. McPhillips, K.C., for defendant.

HUNTER, C.J.:—The grant assumes to convey the fee simple without any reservation of the coal, base minerals, or timber which belong to the plaintiffs' claim by virtue of their letters patent from the government of Canada, dated 21st April, 1887, the company not disputing that the defendant is entitled to the surface rights.

It was finally decided by the Privy Council in Esquimalt and Nanaimo R. W. Co. v. McGregor, [1907] A. C. 462,

that the Act of 1904 was intra vires of the legislature, and that a similar grant to the defendant McGregor superseded the plaintiffs' title under their letters patent. With regard to this decision, it may be proper to point out that their Lordships appear to have been under a misapprehension as to the ground of the judgment of the full Court. Their Lordships, speaking by Sir H. E. Taschereau, say that we reversed the decision of the trial Judge "and maintained the action on the exclusive ground that the British Columbia Act of 1904 did not authorize the grant of the said lot to the appellant, and consequently," etc. With all deference, no Court could have so decided, as the Act authorizes the issue of the grant in plain and unmistakable language, but the ground of our judgment was that the legislature intended that the issue of the grant should not operate ipso facto to transfer to the defendant property which had been adjudged by the Sovereign in council to belong to the plaintiffs, but to reopen the question in the interest of the settler, whose rights, if any, were to be maintained by the province. In this, however, it appears we were wrong, as their Lordships' opinion is clear to the effect that the issue of the grant to the defendant extinguished, eo instanti, the plaintiffs' rights under the patent.

The grant to the present defendant was admittedly issued by the provincial government without notice to the plaintiffs or without notifying them to shew cause why it should not issue; and therefore Mr. Bodwell contends that it is competent to the Court, in such a suit as the present, to examine into the proceedings leading up to the grant, and further, if that proposition is assented to, that it ought to be declared that there was no bona fide occupation of the land by the defendant's predecessor in title, or that at any rate such occupation occurred as to only a small portion of the 160 acres pre-empted, and that, therefore, the defendant's grant is valid only to the extent of such occupied area.

It will be convenient to examine the first proposition, as, if it is found to be untenable, it will not be, as Mr. Bodwell admitted at the close of the argument, necessary to consider the others.

There is no principle better established in our law than that in an ordinary suit between subjects a patent from the Crown which is ex facie valid cannot be attacked, in the absence of statutory authority, on the ground of any irregularity, mistake, misrepresentation, or fraud which is al-

leged to have occurred in the proceedings leading up to its issue, but such matters may be canvassed only in a suit properly framed for that purpose by or with the assent of the Crown, such as an action by the Attorney-General or by petition of right. If it were not so, no man's title would be safe, and the foundations on which the right to real property at present rest would be swept away. I did not, however, understand Mr. Bodwell to dispute this as a general principle, but he maintained that his clients by reason of their patent had a special locus standi to challenge a title which was of no greater solemnity than their own.

But I cannot concede this, because, as I read the decision of the Judicial Committee in the McGregor case, the statute in effect enacts that upon the issue of the defendant's grant the plaintiffs' rights shall cease and determine. Ex hypothesi, then, the defendant's title destroys the plaintiffs', and there is nothing left to take the case out of the ordinary rule to which I have referred.

But, even if the plaintiffs had any lecus standi in this action to attack the proceedings leading up to the defendant's grant, they would make no headway, as the Act provides that the grant is to issue, not on application to a ministerial officer, who would be subject to the compulsive process of the Court, but on application to the Lieutenant-Governor in council, whose acts cannot be reviewed in the ordinary action between subjects, in the absence of special legislative authority to do so, except possibly in a case where the act impugned was void on its face, in which case it would not in reality be the act of the Lieutenant-Governor in council at all.

I therefore must hold that the plaintiffs can have the proceedings leading up to the defendant's grant examined only in a suit brought either by the Crown or with its assent, and therefore the present action must be dismissed, but without costs, as the statute requires that the defendant's rights shall be defended at the expense of the Crown, and costs are given only by way of indemnity and not as a bounty: see, e.g., Richardson v. Richardson, [1895] P. 346; Meriden Britannia Co. v. Braden, 17 P. R. 77.

BRITISH COLUMBIA.

MORRISON, J. MARCH 14TH, 1908.

CHAMBERS.

REX v. NARAIN.

Constitutional Law — British Columbia Immigration Act, 1908—Ultra Vires—B. N. A. Act, sec. 95—Legislative Field Occupied by Dominion Legislation.

Application by defendants for a writ of habeas corpus to obtain their release from custody under a conviction as set out below.

Woods, for defendants.

A. D. Taylor, K.C., for the Crown.

MORRISON, J.:—The prisoners on whose behalf the application is made for a writ of habeas corpus arrived in the port of Vancouver some days ago, and were examined by Dr. Monroe, the Dominion immigration agent, who was satisfied that they had complied with the requirements of the Dominion Immigration Act, and granted them permission to land pursuant to sec. 17 thereof, which is as follows. "The master of any vessel shall not permit any passenger to leave the vessel until written permission from the immigration agent to allow his passengers to land has been given the master. 2. The immigration agent at the port of entry, after satisfying himself that the requirements of this Act and of any order in council, proclamation, or regulation, made thereunder, have been carried out, shall grant permission to the master of the vessel to allow the passengers to leave the vessel."

Immediately upon their landing, the provincial authorities caused their detention, and they were subjected to the test set out in the British Columbia Immigration Act, 1908, which test they failed to stand, and they were accordingly charged with an infraction of that Act, convicted, and sentenced to the limit provided.

The ground relied upon in this application for their release is that the British Columbia Immigration Act, 1908,

is ultra vires of the legislature. I agree with this contention.

Section 95 of the British North America Act enacts "that in each province the legislature may make laws in relation to agriculture in the province and to immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces and to immigration into all or any of the provinces; and any law of the legislature of a province in relation to agriculture or to immigration shall have effect in and for the province, as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

The Parliament of Canada, pursuant to the power contained in that section, passed ch. 93 of R. S. C. 1906, and the amending Act of 1907, known as the Immigration Act, applicable to the whole of Canada.

By secs. 26 to 29, inclusive, certain classes of immigrants are excluded in terms. The federal legislation thus occupies "the field" as to those.

Then sec. 30 enacts: "The Governor in council may, by proclamation or order, whenever he considers it necessary or expedient, prohibit the landing in Canada of any specified class of immigrants, of which due notice shall be given to the transportation companies. 2. The Governor in council may make such regulations as are necessary to prohibit the entry into Canada of any greater number of persons from any foreign country than the laws of such country permit to emigrate to Canada." The remainder of the field is thus, as it were, pre-empted, shewing, in my opinion, that the Parliament of Canada intended to deal exclusively with the question of immigration into Canada.

But, whereas the sections above referred to point out the classes of immigrants who may not enter Canada, sec. 17, supra, and secs. 35 and 53, to my mind, clearly give a right in terms to land to immigrants such as the prisoners.

If that be so, then the Dominion Act is met at once by the provincial Act, by sec. 7 of which "any person who, or corporation which, shall in any way assist any immigrant to contravene the provisions of this Act shall be deemed to have contravened this Act, and shall be liable to the penalties imposed by sec. 5 of this Act upon any such immigrant."

The Privy Council last year laid down two propositions in the case of Grand Trunk R. W. Co. v. Attorney-General

for Canada, [1907] A. C. at p. 68, viz.. "First, that there can be a domain in which provincial and Dominion legislation overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that, if the field is not clear, and in such domain the two legislations meet, then the Dominion legislation must prevail."

These propositions were adopted by Lord Collins in delivering the judgment of the Privy Council this year in the case of City of Toronto v. Canadian Pacific R. W. Co., [1908] A. C. 54.

This last case goes very far indeed, for the power to legislate there was inferential only, whereas in the present instance, sec. 95, supra, gives the Dominion the power in terms, and in terms enacts that in a domain where the two legislations meet, and the field is not clear, the Dominion legislation must prevail.

I do not think that those two Acts can stand together. They meet emphatically, and therefore the Dominion Act must prevail.

Order made for discharge of prisoners.

BRITISH COLUMBIA.

CLEMENT, J. MARCH 28TH, 1908.

SINGLE COURT.

REX v. GARVIN.

Constitutional Law—British Columbia Health Act—Regulations Issued by Lieutenant-Governor in Council—Standard of Quality of Milk—Ultra Vires—Field Occupied by Federal Legislation—Dominion Adulteration Act.

Motion by defendant to quash his conviction by the acting police magistrate for the city of Vancouver for having in his possession milk intended for sale which did not have the minimum composition required by sec. 20 of the regulations governing the sale of milk and the management of dairies, cow-sheds, and milk shops, issued by the Lieu-

tenant-Governor in council under the provisions of the Provincial Health Act, R. S. B. C. 1897 ch. 91.

The motion was heard at Vancouver.

C. W. Craig, for defendant.

J. K. Kennedy, for informant.

CLEMENT, J.: — Various objections were urged against this conviction, but I find it necessary to express a decided opinion upon one only, as will appear.

I think it must now be taken that provincial regulation, and even prohibition, of the traffic in particular commodities is intra vires (as relating to a matter "of a merely local or private nature in the province") so long as such traffic is dealt with in its local or provincial aspect: Manitoba Liquor Act Case, [1902] A. C. 73. But at the same time if such traffic has or acquires a larger national aspect, it may properly be dealt with by federal legislation under the "peace, order, and good government" clause of sec. 91 of the British North America Act: Regina v. Russell, 51 L. J. P. C. 77, as explained in the Local Option Cases, 65 L. J. P. C. at p. 33, and, to the extent to which the ground is covered by such federal legislation, provincial legislation is inoperative; if of earlier date than the federal it is overridden and ceases to be law, at least so long as the federal Act remains in force; if of later date, it is ultra vires. The result is the same in either case; the provincial enactment is not law.

The traffic in milk has to some extent been the subject matter of federal legislation; and it was not suggested that the clauses of the Adulteration Act, R. S. C. 1906 ch. 133, which deal with milk, are not within the competence of the Parliament of Canada. Such a contention, it seems to me, could not be successfully maintained so long as the authority of Regina v. Russell is maintained, for the quality of an article of food of such universal consumption throughout Canada as milk is as much a matter of large national concern as the liquor traffic dealt with in Regina v. Russell. By sec. 26 of the Adulteration Act, it is provided that the Governor-General in council shall fix the standard of quality and the limits of variability in the constitutent parts of any article of food. I have not referred to the order in council by which this imperative duty was performed in the case of milk, but the defendant here ad-

mitted before the learned magistrate that his milk had failed to reach the standard set by the federal authorities. At all events, if the duty of fixing the standard rests upon the Governor-General in council, it cannot be undertaken by or under the authority of provincial legislation, and sec. 20 of the provincial regulations is therefore ultra vires, and this conviction, based solely upon that section, must be quashed, with costs.

Conviction quashed.

BRITISH COLUMBIA

LAMPMAN, Co.C.J. MARCH 31ST, 1908.

COUNTY COURT OF VICTORIA.

JOHANSEN v. ELLIOTT.

Costs—Scale of—Payment into Court—Amount Recovered by Plaintiff beyond that Paid into Court.

Motion by plaintiff for a direction as to the scale of costs.

Gregory, for plaintiff.

Lowe, for defendant.

LAMPMAN, Co.C.J.:—Plaintiff sued for $170.97. Defendant admitted owing $132.50, and pleaded that before the action was brought, he had tendered plaintiff that amount, and with the dispute note $132.50 was paid into Court. I decided on the trial that in addition to the $132.50 defendant owed plaintiff $38.47, and the question now is on what scale should the costs be taxed—on the scale applicable to $38.47, or $170.97? At the trial the plea of tender was abandoned, but I am satisfied that the plea of tender in the dispute note was bona fide and not made with the intention of evading the necessity of paying the sum of $8.25 to cover costs which must have been paid if the payment in had been made pursuant to Rule 133. Mr. Gregory says that McLean v. Dove, 13 B. C. R. 292, decided by my brother Howay, is not in point, and cites Henderson v. Bank of Hamilton, 25 O. R. 641.

The facts in McLean v. Dove were certainly different, but I think the underlying principle in it and in the cases on which it is founded is that the amount of costs shall be governed by the size of the amount which was fought out at the trial, and is not to be governed by fine distinctions as to the meaning of words and phrases. At the trial the only point was whether the plaintiff should get $5 or $5.50 per day; defendant admitted owing $5 per day, and paid an amount into Court figured on that basis. Turn and twist it in any way you will, I cannot see that at the trial there was a dispute about any greater sum than $38.47, and on the scale applicable to that sum I think the costs should be taxed.

Our Rules are not by any means a complete code on the question of costs.

As to Henderson v. Bank of Hamilton, supra, clearly the plaintiff was entitled to costs, and in Ontario in the High Court there is only one scale: the amount sued for was beyond the competence of the County Court, and therefore Con. Rule 1132 (Holmested & Langton, p. 1358) could not operate so as to make the County Court scale applicable. As I understand that decision, it is only that Mr. Justice Street saw no reason to direct that anything except the ordinary costs be allowed.

There will be no costs of this application.

[See Stephens v. Toronto R. W. Co., 13 O. L. R. 363, 9 O. W. R. 259.]

BRITISH COLUMBIA.

MARCH 31ST, 1908.

FULL COURT.

KIRKLAND v. BROWN.

Appeal to Supreme Court of British Columbia—County Court Appeal—Time—Pronouncing of Judgment—Issue of Formal Judgment.

Appeal by defendant from judgment of YOUNG, Co.C.J., in favour of plaintiff in an action of replevin.

The judgment was pronounced on 11th July, 1907. The plaintiff did not issue the judgment, relying on the entry made by the registrar in the record book.

On 29th October, 1907, the defendant had the formal judgment drawn up and entered, and on 18th November, 1907, served notice of appeal upon the plaintiff's solicitor.

On the appeal coming on for hearing before the full Court on 31st March, 1908, J. A. Aikman, for the plaintiff, objected that the Court had no jurisdiction to hear it, because the notice of appeal was served after the expiration of 3 months (the time limited by sec. 90 of the Supreme Court Act) from the date of the delivery of judgment, as in the County Court the time begins to run from the date of the delivery of judgment and entry of the same by the registrar in the cause book.

W. Pollard Grant, for the defendant.

THE COURT (IRVING, MARTIN, and MORRISON, JJ.), upheld the objection and dismissed the appeal.

ALBERTA.

STUART, J. FEBRUARY 28TH, 1908.

TRIAL.

SHORT v. GRAHAM.

Mortgage—Transfer of Land Subject to Mortgage—Implied Covenant by Transferee with Mortgagee to Pay Mortgage Money—Land Titles Act, sec. 52—Certificate of Title—Evidence to Shew that Transfer by Way of Security only—Admissibility—Transfer of Bare Legal Estate—Transferee not Liable unless upon a Real Purchase.

SPECIAL CASE.

This action was commenced on 14th January, 1908, by a writ of summons, whereby the plaintiff claimed:—

(a) Payment of $700 and interest thereon at 9 per cent. per annum from 27th August, 1907, until judgment.

(b) In default thereof, that the mortgaged premises might be sold free from all incumbrances and the proceeds of the sale applied towards the payment of debt and costs, and that the defendant Graham, as assignee of Alexander D. McDonald, and also that defendants Hatfield and McLaren might be ordered to pay the balance of the mortgage debt and costs, after deducting the amount realized by such sale.

(c) Judgment against defendant Graham, as assignee, and also against defendants Hatfield and McLaren for the immediate recovery of the sum of $700, interest, and costs of this action.

The parties concurred in stating the questions of law in the following case for the opinion of the Court:—

1. On and prior to 27th August, 1907, Alexander D. McDonald was the registered owner in fee simple of lot 53 in block H, according to a plan of record in the land titles office for the South Alberta land registration district, as "Hillhurst, Calgary, 5609 J."

2. On 27th August, 1907, Alexander D. McDonald executed a mortgage covering lot 53, in favour of the plaintiff, to secure a loan of $700 and interest thereon as therein mentioned, which loan was made on 27th August, 1907, by the plaintiff to Alexander D. McDonald, which mortgage was registered on 10th October, 1907.

3. On 7th November, 1907, Alexander D. McDonald signed and delivered a transfer of lot 53 to the defendants Hatfield and McLaren, which transfer was registered by them on the same day.

4. Although absolute in form, the transfer was given as security for a prospective advance, which advance was never made, and on or about 9th November the defendants Hatfield and McLaren re-transferred lot 53 to Alexander D. McDonald, and delivered a transfer, duly executed, to the solicitors for Alexander D. McDonald, for registration, but the said transfer was not registered, and on 13th January, 1908, the defendants Hatfield and McLaren signed a second transfer and registered it, re-transferring lot 53 to Alexander D. McDonald.

5. Lot 53, including all buildings and improvements thereon, is not of sufficient value to satisfy the mortgage, interest, and costs.

6. Alexander D. McDonald is insolvent.

7. The questions for the opinion of the Court are:—

(a) Whether evidence would be admissible at the trial of this cause, against the objection of the plaintiff, to prove the facts set out in that portion of paragraph 4 which reads as follows: "Although absolute in form, the transfer was given as security for a prospective advance, which advance was never made."

(b) Whether the defendants Hatfield and McLaren are liable to the plaintiff for the amount secured by the mortgage or any portion thereof.

8. The facts which are contained in paragraph 4 and referred to in paragraph 7 (a) are to be considered by the Court, if, in the opinion of the Court, evidence would be admissible at a trial of this case to prove them: otherwise, they are not to be considered.

9. If the Court shall be of opinion in the affirmative, judgment shall be entered for the plaintiff for the amount for which the defendants Hatfield and McLaren are found liable, and interest, and costs to be taxed.

10. If the Court shall be of opinion in the negative, then judgment shall be entered for the defendants Hatfield and McLaren, dismissing this action as against them, with their costs of defence.

G. H. Ross, for plaintiff.

C. T. Jones, for defendants.

STUART, J.:—The special case submitted involves a consideration of the proper interpretation of sec. 52 of the Land Titles Act, which reads as follows: "In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: that the transferee will pay the principal money, interest, annuity, or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor."

This section is new, and was not contained in the Dominion Act of 1894. In proceeding to construe it and to apply

it to the facts of the case submitted, we should, I think, look first at the common law applicable to the circumstances as it existed prior to the enactment. Where property was sold subject to mortgage, the purchaser was held in equity bound to indemnify the vendor against his personal liability to the mortgagee under the covenant to pay contained in the mortgage. The only way by which the mortgagee could avail himself of this equitable obligation was by obtaining an assignment of his rights by the vendor to himself, and then, having obtained this, he could sue the purchaser for personal judgment: Maloney v. Campbell, 28 S. C. R. 228; also in the Court below, 24 A. R. 224. In the latter report Maclennan, J.A., referring to a previous judgment of Vice-Chancellor Spragge, said: "That very learned Judge declared emphatically that he had 'no doubt that the equity of the mortgagor to compel his assignee to pay, would pass by express assignment to the mortgagee.' He added that such an assignment would not fall within the mischief of Prosser v. Edmonds, 1 Y. & C. Ex. 481, and that class of cases; and that it would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay, and would create the privity which alone was wanting to make such a suit maintainable."

This being the state of the law before the passing of the section of the Act in question, it was evident that, unless the mortgagee was fortunate enough to be able to obtain such an assignment of the vendor's equitable right of indemnity, he could not sue the purchaser for the money due on the mortgage. The vendor might be unwilling or he might be dead or undiscoverable. In such case the mortgagee could do nothing against the purchaser except take the land itself. In my opinion, the section in question was passed to relieve the mortgagee from this difficulty, and, as said by Maclennan, J.A., to "give a direct right of suit between the party to receive and the proper party to pay," and to "create the privity which alone was wanting to make such a suit maintainable," this being done by the mere operation of the statute, instead of, as formerly, by means of the vendor's assignment of his right.

Such being plainly the purpose and effect of the statute, how are we to apply it to the present case?

It is to be observed that the covenant is declared to be implied "in every instrument transferring land," etc. Now,

whatever else a certificate of title may be, it is certainly not "an instrument transferring land." I cannot, therefore, see the point in the contention of the plaintiff's counsel that we cannot go behind the certificate of title, because we must go behind it to reach the instrument in which the covenant is to be implied. The certificate of title merely expresses and certifies that a certain legal result has followed from the execution and registration of the transfer, namely, that the legal estate in the property has passed to the transferee. The case of Wilkie v. Jellett, 2 Terr. L. R. 133, and in appeal 26 S. C. R. 282, decided at a time when the Territories Real Property Act contained a provision similar to sec. 41, which deals with the effect of unregistered instruments, has clearly established that a transfer may have some effect even before registration, and there are numerous cases shewing that, as between the parties at least, even registration and the issue of a certificate of title is not conclusive, but that the real relations between the parties may still be shewn. I think that here also the real relations between the mortgagor McDonald and the defendants Hatfield and McLaren may still be shewn, notwithstanding the certificate. The plaintiff is not by any means in the position of a subsequent purchaser for value without notice or of a subsequent mortgagee without notice. His security was taken and his money advanced long before the registration of the transfer to the defendants. He is not, therefore, entitled to the benefit of the principle of purchase for value without notice, and there is no reason whatever, from this point of view, why we should not go behind the certificate and inquire into the real nature of the instrument in which it is contended the covenant should be implied and into the real relations between the parties to it. I am of opinion, therefore, that evidence would have been admissible upon a trial to shew that the transfer was given by way of security only. It is admitted that such is the fact, and, indeed, that, although it was intended as a security, it never really acquired even that character, because no money was ever in fact advanced. The question therefore is: Did the instrument ever transfer any interest in the land at all? In my opinion, it did not. The whole beneficial interest in the land, or at least in the equity which McDonald purported to transfer, always remained in McDonald himself, and never passed to the defendants at all. In such a case could McDonald, before the statute, have called upon

the defendants to pay the mortgage moneys and brought suit to force them to do so, and could he have assigned his right to a mortgagee? Of course he could not have done so. And it was not contended or suggested on the argument that McDonald could have himself taken advantage of the statute while the legal title stood in the name of the defendants, and have compelled them to pay the plaintiff his money. Yet the statute says that the covenant is to be implied in the vendor's favour as well as in favour of the mortgagee. This in itself is sufficient to shew that it is impossible to apply the statute in every case in which it is literally applicable. In my view of the case, I doubt very much whether the transfer should be considered as an instrument transferring land, within the meaning of the statute at all, because, as a matter of fact, it did not transfer any interest in the land whatever, but only the bare legal estate. It is perhaps not necessary for me to decide what would have been the position had an advance really been made by the defendants upon the security of the transfer so as to give them for the time being a real beneficial interest, but I venture also to doubt very much whether, even in such a case, the statute could be held to apply. It seems to me that the purpose of the statute is very plain. It is clearly intended to remedy that difficulty of procedure in which a mortgagee formerly found himself, and which I have already pointed out.

I am very strongly of opinion that the application of the statute should, therefore, be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his interest on the part of the transferor, and that whenever it is impossible for the vendor, the transferor, to take advantage of the covenant declared to be implied in his favour, that is, wherever he would have had, before the statute, no right against the purchaser capable of assignment to the mortgagee, which is admittedly the case here, then the covenant should not be implied in favour of the mortgagee either. I am speaking now, of course, without regard to the possible exception in the case of an express agreement by the vendor to waive his right of indemnity. The law formerly was that the purchaser, taking finally the whole interest in property subject to an incumbrance, was bound to pay off that incumbrance and could be sued by the vendor and made to pay the money, not to the vendor himself but to the mortgagee; and I

think the statute was merely intended to make that obligation enforceable by the mortgagee directly against the purchaser, without any circuity of procedure. The statute was surely intended merely to be beneficial, to aid in the enforcement of just rights, and not to work such an injustice as would certainly be involved in applying it to the circumstances of this case. If Hatfield and McLaren had really bought the property, and had ever intended to become the actual owners of it, it would, no doubt, in accordance with the old rule, have been just that they should pay off the incumbrances upon it, and should submit themselves to the obligations of the covenant declared by the statute to be implied against them; but I am quite convinced that they do not as the case now stands come within the meaning and real intent of the statute; and the action will, therefore, be dismissed as against them with costs, in accordance with the terms of the special case.

ALBERTA.

TAYLOR, DIST. CT. J. FEBRUARY 25TH, 1908.

CHAMBERS.

MILNER v. MARRIOT

Service of Papers—Garnishing Summons—Mistake in Copy Served—Name of Clerk of Court Omitted—Refusal to Set aside Service—Costs.

Motion by the Canadian Bank of Commerce, garnishees, to set aside the service of a garnishing summons.

F. C. Jamieson, for the garnishees.

J. R. Lavell, for the plaintiff.

No one for defendants.

TAYLOR, DIST. CT. J.:—The plaintiff sued the defendants, acting together under the name of the Strathcona Hockey Club, and made the Canadian Bank of Commerce garnishees.

By error on the part of the plaintiff's solicitor, the copy of the garnishing summons did not bear the name of

the clerk of the Court, but the place where his name is signed on the original is left blank in the copy.

The garnishees now apply to have the service set aside. The omission does not seem to me to be of sufficient importance to justify me in setting aside the service. While I do not wish to countenance carelessness on the part of the solicitors, and, were the applicants prejudiced in any way, I should not hesitate to set aside the service, in this case it can matter little to the applicants whether the service is set aside or not.

The summons directs the garnishees to notify the clerk by statement in writing whether or not there is any debt due or accruing due to the defendant, and, if so, why the same should not be paid into Court to the credit of the cause.

This seems explicit and can cause no mistake.

In Sevarty v. Canadian Northern R. W. Co., cited by the counsel for the applicants, I can find no written judgment, only an order setting aside the service. The learned Judge who signed the order was unable to tell me whether the matter had been argued before him or not. I am of the opinion that the counsel for the plaintiff in that case did not contest the matter, but decided to consent to the order and effect new service.

All the reported cases that I can find seem to point to overlooking any technical errors as far as possible.

I will, therefore, dismiss the application, but, as there has been carelessness on the part of the solicitor for the plaintiff, I refuse to give him any costs.

ALBERTA.

TAYLOR, DIST. CT. J. MARCH 13TH, 1908.

CHAMBERS.

HORNER v. STEVENSON.

Cheque—Action on Dishonoured Cheque—Illegal Consideration—Agent's Commission on Sale of Land—Real Estate Agent—Municipal By-law Requiring License—Revenue By-law—Recovery of Commission notwithstanding Want of License—Settlement—Estoppel.

Motion by plaintiff to strike out the statement of defence and to enter judgment for the plaintiff in an action to re-

cover the amount of a cheque drawn by defendant upon a bank in favour of plaintiff, and dishonoured.

G. B. O'Connor, for plaintiff.

S. E. Bolton, for defendant.

TAYLOR, DIST. CT. J.:—The plaintiff acted as a real estate agent for the defendant, and sold a certain property for him. The defendant gave plaintiff a cheque for the commission, but afterwards stopped payment of the same. The plaintiff then sued on the cheque, and now applies to set aside the defendant's statement of defence and enter judgment.

The defendant abandons all the allegations of his defence except one, which is:—

"4. If the defendant made the cheque or any cheque, which he denies, it was given for an illegal consideration, namely, as follows: the plaintiff, not being a duly qualified real estate agent or licensed to do business as such within the city of Edmonton, and not having complied with the by-law of the city of Edmonton in that behalf, sold for the defendant a certain piece of land and charged the defendant with the amount of said cheque as his commission as agent for so doing."

It is admitted that the plaintiff did not hold, at the time of the sale, a license from the city of Edmonton as a real estate agent; also that the defendant gave to the plaintiff the cheque sued upon.

The charter of the city of Edmonton gives the council power to pass by-laws for issue of licenses and payment of license fees in respect of any business, provided that the same shall not be contrary to the general law of the Territories and bona fide.

"The power to license shall include power to fix fees to be paid for licenses, to specify the qualifications of the persons to whom and the conditions upon which such licenses shall be granted, to regulate the manner in which any licensed business shall be carried on, to specify the fees or prices to be charged by the licensees, to impose penalties . . . and generally to provide for the protection of the licensees." Title XXII., secs. 2 and 5, Edmonton charter.

The Municipal Ordinance, R. O. 1905 ch. 70, sec. 95, says: "The council of any municipality may pass by-laws for: (33) Controlling, regulating, and licensing . . . real estate dealers and agents," etc.

The council of the city of Edmonton did pass a by-law for licensing real estate dealers or agents, but this by-law contains nothing for controlling or regulating the same. It fixed a certain fee for the license, and no condition was imposed except the payment of this fee.

In Johnson v. Hudson, 10 Rev. Rep. 465, the statute required all dealers in tobacco to enter themselves as such with the excise office and take out a license. The plaintiffs had not been so licensed. The Court held that the plaintiffs could maintain the action, as there was no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties.

In Cope v. Rowlands, 2 M. & W. 149, the plaintiff, who was not a licensed broker for the city of London, brought action to recover his brokerage. In his judgment Parke, B., says: "The question for us now to determine is, whether the enactment of the statute 6 Anne ch. 16 (altered as to the amount of penalty by 57 Geo. III. ch. 60) is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it; or whether one of its objects be the protection of the public and the prevention of improper persons acting as brokers. On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; on the latter it is; for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing." The statute above mentioned requires all applicants to appear before the court of the mayor and aldermen before license would be granted.

As I have already stated, the by-law of the city of Edmonton has no such provision. The applicant has only to pay his fees and get his license.

I am therefore of the opinion that the by-law licensing real estate agents is for revenue only, and the plaintiff is entitled to maintain his action.

There is another point on which it seems to me the plaintiff would be entitled to succeed, though it was not raised by the counsel for him. The defendant gave his cheque for the amount, and therefore made a settlement with the plaintiff. Is the defendant not now estopped from setting up this defence?

I have not looked the point up, as I had reached a decision before it occurred to me, and, as I have decided already for the plaintiff, it is unnecessary to do so.

The defendant's defence is, therefore, set aside, and the plaintiff is entitled to enter judgment for the amount of the claim.

ALBERTA.

TAYLOR, DIST. CT. J. MARCH 20TH, 1908.

DISTRICT COURT.

REX v. PICKARD.

Indian — Conviction for Selling Liquor to Indian—Indian Act—Mens Rea—Presumption—Evidence.

Appeal by defendant, Isaac H. Pickard, a wholesale liquor dealer of the city of Edmonton, from his conviction by a magistrate for supplying an intoxicant to one William Ward, an Indian.

O. M. Biggar and G. B. O'Connor, for defendant.

H. H. Parlee, for the Crown.

TAYLOR, DIST. CT. J.:—The facts brought out in the evidence are that Ward and another Indian, named Bonenose, went into the store of Pickard on 24th December, 1907, and purchased a bottle containing an intoxicant, Ward giving for the same a $1 bill. They described the store and the place on the shelf where the intoxicant was taken from, and pointed out Pickard, who was in the court room, as being the man who gave it to them; at the same time they each got one of Pickard's business calendars. Each knew only a few words of English. Pickard asked them no questions whatever. They got the calendars by pointing to them and asking for them in Cree. They wore moccasins. Both belonged to Enoch's band and lived in an Indian reserve, and both "took treaty."

Mr. Blach, the Indian Agent, and Mr. Foley, the Indian interpreter, both stated that both Ward and Bonenose were Indian, "took treaty," belonged to Enoch's band, and lived in the Indian reserve at Stony Plain.

The accused Pickard said that he did not remember seeing Ward and Bonenose in his store on that day; that it

was his custom to ask all who looked like Indians if they "took treaty" or were Indians.

It seems to me conclusive that Ward got the intoxicant from Pickard, and that he, Ward, is an Indian, within the meaning of the Indian Act.

With these facts, was Pickard properly convicted under the Indian Act?

In Regina v. Mellon, 5 Terr. L. R. 301, 22 C. L. T. Occ. N. 343, the Indian that got the liquor said that he never dressed as an Indian, that he had worked at freighting, that he never wore moccasins, that on the day he got the liquor he was driving a team of horses, selling posts. In his judgment Rouleau, J., says that "he," the Indian," speaks English fluently and dresses better than many ordinary white men; and there is no indication whatever, in his appearance, in his language, in his general demeanour, that he does not belong to the better class of half breeds."

Compare this with the present case. Ward was fairly dark, wore moccasins, could speak little or no English, and looks a good deal like an Indian.

Bonenose, who accompanied Ward, was rather darker than Ward, wore moccasins, could speak no English, excepting a few words, and is, so far as I can tell, very much like an Indian, in appearance, even more so than Ward.

Again in the same case the learned Judge says: "Of course, if there was any evidence to shew that he was not in good faith, that he might have had some reason to believe that the man was an Indian, or that he was suspicious, and ran his chances, I would not then hesitate to confirm the conviction."

Was there not in the appearance of these men sufficient to arouse suspicions and put Pickard on his guard? It seems to me that it was sufficient; but Pickard did not even ask the questions which it was his custom to ask in suspicious cases. Does it not seem reasonable to suppose that he took his chances?

But suppose that Pickard did act innocently, is he excused?

The counsel for the accused cited Sherras v. De Rutzen, [1895] 1 Q. B. 918. In that case there was a conviction for selling liquor to a constable when on duty, contrary to the Imperial Licensing Act. A constable when on duty wore an armlet, and it was known that they always removed this armlet when off duty. The licensee supplied liquor to a

constable who was on duty, but who had removed his armlet. It had been the custom for the constables, when off duty, to frequent the shop of the licensee and to be supplied with liquor. The conviction was quashed on the ground that there was nothing to shew that the constable was on duty.

In the present case the appearance of both Ward and Bonenose was undoubtedly that of Indians, sufficient, to my mind, to arouse the suspicions of anybody.

It is true that there are many half breeds that look like Indians, and the counsel for the accused brought into Court many for that purpose, but, to my mind, this makes my contention all the stronger that Pickard, knowing how difficult it was to distinguish the Indian from the half breed, should have been on his guard, and refused the liquor till he found out whether they were Indians or half breeds.

In the case above mentioned, Wright, J., says: "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered." He then cites several cases, and then places the presumptions in three classes, the first of which is "a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited."

In my opinion, the present case comes under this exception. It is no more a crime in itself to sell liqour to an Indian than it is to a white man, but the Parliament of Canada, knowing, as it is a matter of general knowledge, that Indians are so constituted as to be unable to withstand the appetite for liquor, and unable to take it in moderation, that it has a low-moral and degrading influence over them, and there is nearly always trouble when they can get it, they have passed what may be called class legislation prohibiting the sale or giving of liquor to them in any manner or form, except as a medicine.

That Parliament intended to make it absolutely prohibition is, I think, fully borne out by the wording of the section.

It seems to me very difficult to form a more prohibitive section than 135 of the Indian Act.

As the counsel for Pickard took certain objections to the conviction on its face, and as the argument on these was adjourned until I should have disposed of the case on the merits, I will not now affirm the convictions until these objections are disposed of.

ALBERTA.

SCOTT, J. MARCH 27TH, 1908.

SINGLE COURT.

WHITE v. EDGAR.

Vendor and Purchaser—Contract for Sale of Land—Vendor Declining to Convey—Action for Specific Performance—Defence—Caveat—Incumbrance Created by Purchaser.

Motion by plaintiff for summary judgment under Rule 229.

C. A. Grant, for plaintiff.

G. B. O'Connor, for defendant.

SCOTT, J.:—The application is founded on admissions made by the defendant in his examination for discovery. It was made under Rule 229, but counsel for the parties agreed that I should dispose of the issues in the action upon the material before me.

The plaintiff claims specific performance of an agreement entered into by the defendant with him for the sale of certain lots in Edmonton. The defendant, in his examination for discovery, admitted the agreement for sale. and that the purchase money had been paid in full, and that the only reason why the agreement had not been fulfilled on his part was that one Dickson had filed a caveat against the property. The only ground of defence urged before me was that the filing of this caveat was an incumbrance which had been made and suffered by the plaintiff.

In his examination for discovery the defendant states that after he sold the lots to the plaintiff, he met the plaintiff in Ontario, and asked him what he would take for the lots; that plaintiff then said that he would let them go for $650 each; that he (defendant) then wrote to one Hanson, a real estate agent in Edmonton, stating that he could let

him have the lots for $700 each; that, Hanson having written him that he could sell at that price, he went to see plaintiff "to get his signature for the lots," but that plaintiff then refused to sell for less than $1,000 each.

It appears that Hanson, believing that the defendant owned the lots, entered into an agreement to sell them to a purchaser for whom Dickson, the caveator, was acting, and that the latter filed the caveat to protect the interest of his principal under the agreement. The caveat has since been removed at the instance of the defendant.

In view of these statements of the defendant, I cannot see that the plaintiff is in any way responsible for the filing of the caveat, or that his conduct led to its being filed. What he said to the defendant was at most merely a verbal offer to sell the lots to him at $650 each. It cannot be inferred, from what he said, that he constituted the defendant his agent to sell the lots for him, and, even if that could be inferred, there is nothing to shew that the defendant was authorized to delegate that authority to another. In so far as plaintiff is concerned, Hanson acted entirely without authority, and I therefore cannot see that the plaintiff should be held accountable for his act.

I hold that the plaintiff is entitled to a judgment declaring that the agreement is one that should be specifically performed by the defendant. Plaintiff to have the costs of the action. Further directions to be reserved.

ALBERTA.

HARVEY, J. MARCH 28TH, 1908.

TRIAL.

WINTERBURN FARM CO. v. EDMONTON, YUKON, AND PACIFIC R. W. CO.

Railway—Fences—Failure to Erect—Land Severed by Railway—Cattle Trespassing and Injuring Property—Liability of Railway Company—Rest of Land not Surrounded by Lawful Fence—Fence Ordinance—Railway Act, R. S. C. 1906 ch. 37, sec. 254—Damages.

Action for damages for injury to plaintiffs' land by cattle getting in by reason of defendants' neglect to erect fences.

G. B. O'Connor, for plaintiffs.

O. M. Biggar, for defendants.

HARVEY, J.:—The defendants' line of railway crossed the land of the plaintiffs. During the construction of the railway, and later its operation in 1906-1907, the fences along the highway at the crossing of the railway were torn down, and no fences were ever erected along the right of way, through the plaintiffs' land. Cattle came in on the plaintiffs' land, and caused damage to crops and stacks of hay and grain. The action was tried before me, with a jury, and I instructed the jury that if they found that the cattle got on the land and caused damage, by reason of the defendants' neglect to erect fences, they were to assess the damages. The jury found a verdict in favour of the plaintiffs for $1,202.50, on which the plaintiffs now move for judgment.

The evidence shewed that the rest of the plaintiffs' land was not surrounded by a lawful fence, within the meaning of the Fence Ordinance, ch. 28 of 1903 (2nd sess.), and defendants' counsel contends that the plaintiffs cannot recover by reason of sec. 2, which provides that "no action for damages caused by domestic animals shall be maintained, nor shall domestic animals be liable to be distrained, for causing damage to property, unless surrounded by a lawful fence." Counsel for the plaintiffs objects that this statute, not having been pleaded, cannot be taken advantage of. Apart from this objection and the consideration of permitting an amendment, it appears to me that the contention cannot be upheld. Section 7 is as follows: "The owner of any domestic animal which breaks into and enters upon any land surrounded by a lawful fence shall be liable to compensate the owner of such land for any damage done by such animal." It appears to me that sec. 2 contemplates actions against the owners of the animals only, and that it can have no application to cases where the damage is caused by wilful act or neglect of the defendant, even should he be the owner. If it were otherwise, a person might deliberately tear down a fence and drive in cattle and escape liability, provided any portion of the fence did not answer the description of a lawful fence. Indeed, it would seem to go even further, for, though there might be a lawful fence everywhere, when a part was torn down there would be none there, and hence the plaintiffs' action would be barred. I have no hesitation in declining to accept an argument which leads to such conclusions.

It was also suggested that under the Fence Ordinance the plaintiffs would have had the right to erect a fence and recover the cost from the defendants. In view of the obliga-

tion to fence imposed by the Railway Act, it would appear that the provisions of the Ordinance would not apply, but, even if they did, the right to take this course would not evolve the obligation to do so, and the failure to do so would not excuse the defendants' neglect.

The question to be determined then is, whether the damage suffered is one for which the defendants can be held liable, in view of the provisions of the Railway Act, R. S. C. 1906 ch. 37, sec. 254, which prescribes what fencing, etc., shall be done by the railway company. Sub-section 3 is as follows: "3. Such fences, gates, and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway." This seems to indicate the object of the section, and it is urged that the damage suffered here does not come within the purview of the section, and the defendants cannot be held liable. It has, no doubt, been held that a railway company are only liable under this section for injury done to animals on the railway, the latest case to which my attention has been called being McKellar v. Canadian Pacific R. W. Co., 14 Man. L. R. 614, but that case was decided under the Act of 1888, in which the section corresponding to sec. 254, viz., 194, contained a provision declaring the company liable, in case of neglect, for all damages done by their trains and engines to cattle, horses, and other animals not wrongfully on the railway. When the new Railway Act was passed in 1903, this provision was left out, and it is necessary to determine whether the effect of the amendment of the law by its omission is to extend the liability of the railway company to such cases as the present. For this purpose it seems useful to look at the conditions when the law was changed. The Railway Act in force at the time of Confederation, ch. 66 of the Consolidated Statutes of 1859, contained, in sec. 13, very similar provisions to the section as to fencing contained in the Act of 1888, with similar provisions as to the liabilities. It also contained another section, 16, requiring, under certain conditions, the company to erect fences for the benefit of adjoining owners sufficient "to keep out," cattle, &c., but without any penalty clause for failure. It was held by the Courts that neglect to comply with this provision rendered the company liable for damages by trespassing cattle. See Nichol v. Canada Southern R. W. Co., 40 U. C. R. 583. This provision was incorporated in the Ontario Railway Act, and is contained in R. S. O. 1897. It was, however, dropped when the first federal Act was

passed in 1868, and has never been incorporated in any Dominion Act. In 1888, however, sec. 289 was added, declaring that every company omitting to do any matter, act, or thing required to be done, is liable to any person injured thereby for the full amount of damages sustained by such omissions. In view of the special and limited liability imposed by the section relating to fences, the liability of the company was not held by the Courts to be increased. In 1901, in Grand Trunk R. W. Co. v. James, 31 S. C. R. 420, the Supreme Court of Canada considered the liability of the company under the then sec. 194, and at p. 431 Sedgewick, J., says: "The only penalty for breach of the requirements in regard to fences and cattle guards is that in the event of the company's neglect, the company shall be liable to the owner, not for all damage which may happen to him or his property, but only for the damage which he may suffer on account of animals killed or injured by the company's trains or engines."

This, then, was the state of the company's liability, as declared by the Courts, when less than two years later Parliament passed the Act of 1903. The omission of the liability clause which had been in the section ever since Confederation from the section in this Act, must have been for some purpose, and the only reason I can see for it was to extend the liability by making applicable the general penalty section, which was continued and is to be found in the present Act as sec. 427.

If I am correct in this conclusion, the damages caused being the natural and probable consequences of the defendants' neglect, there can be no doubt of this liability. A case very similar to this is Pound v. Port Huron and South-Western R. W. Co., 19 Am. & Eng. R. R. Cas. 640, where at p. 641 it is stated: "How. stat. 3377 requires every railway company to fence its right of way in such manner that cattle can not get thereon. The evidence in this case shews that it was by getting on the right of way and passing therefrom into the plaintiff's field that they were enabled to do the damage complained of. The right of way passed over the plaintiff's land. It further appears that the premises where the property of the plaintiff was injured was well and securely fenced and sufficiently protected to secure the crops from injury and depredations by stock, until the defendant entered upon the same and took down and away the fences, and thus left the field to the inroads of cattle coming upon and in

their right of way. In doing this the company incurred the liability claimed by the plaintiff." The provisions of the Michigan Act mentioned seem to be to the same effect as ours, and with the same purpose indicated, and there is scarcely a word in the statement of the facts of the case which is not applicable to the present one.

In Levesque v. New Brunswick R. W. Co., 29 N. B. R. 588, the Supreme Court of New Brunswick held the company liable for damages caused by trespassing cattle, for failure to comply with a statutory provision to fence. The only case I have found directly on the point since the Railway Act of 1903 is Lizotte v. Temiscouata R. W. Co., 37 N. B. R. 397, 6 Can. Ry. Cas. 41, in which the conclusion was the same as I have reached, but, as the verdict which was asked to be set aside was for only $3, and the Court, while refusing to set it aside, gave no reasons and expressed some doubt, it does not appear to be a very conclusive authority. The editors of the Canadian Railway Cases in their notes to the case on p. 53 say: "No penalty is now imposed in terms for a breach of sec. 199 of the Act of 1903, now the equivalent of sec. 254 of the Act of 1906, and, having regard to the law in other cases, namely, that each person must keep his cattle from trespassing, one would think that no damages other than those caused by the company's trains could be recovered." I cannot accept this conclusion. It assumes that the omission of the limited penalty clause by Parliament meant nothing. It seems to overlook the general penalty section, and, as far as this province at least is concerned, a reference to the provisions of the Fence Ordinance, above quoted, seems to indicate that the law as to cattle trespassing is not as stated.

For the reasons stated, I am of the opinion that the defendants are liable, and the plaintiffs should have judgment in accordance with the verdict, and there will therefore be judgment for the plaintiffs for $1,202.50 with costs.

If the defendants against whom the action was abandoned have incurred any costs severable from those of the present defendants, such costs will be paid by the plaintiffs.

SASKATCHEWAN.

NEWLANDS, J. MARCH 5TH, 1908.

CHAMBERS.

RE HIND.

Execution—Sale of Land under—Sheriff's Sale—Auction—Land Knocked down to Highest Bidder—Sheriff Reopening Biddings—Property again Put up and Highest Bidder Declared Purchaser—Refusal to Confirm Second Sale.

Application on behalf of the sheriff of the judicial district of Moosomin to confirm the sale of certain land to William T. Hind under two executions against the lands of John Gray, one at the suit of William H. Barton, and the other at the suit of the Imperial Implement Co.

A. L. Gordon, for the sheriff.

T. D. Brown, for William T. Hind.

NEWLANDS, J.:—The sheriff in his affidavit states that on 19th October, 1907, he offered the land for sale by public auction at his office in the court house in the town of Moosomin, at 11 a.m.; "that said land was declared by me sold for the sum of $25 to Edmund R. Wylie, of Moosomin, aforesaid, barrister-at-law, he being the highest bidder therefor; that immediately after said sale to said Edmund R. Wylie, said plaintiff William H. Barton, in the presence of all parties who were present at said sale, with the exception of Edward Lindsey Elwood, of Moosomin, aforesaid, barrister-at-law, informed me that he understood the purchaser at such sale took said land subject to the execution of him the said William H. Barton, and that said sale was being made subject to such execution, and that he would have bid for said land had he known otherwise; that I thereupon immediately reopened said sale, and at my said office offered said land for sale again by public auction, when the same was sold to the said Edmund R. Wylie for William T. Hind, of Moosomin aforesaid, lumber dealer, for the sum of $360, he being the highest bidder therefor."

William H. Barton in his affidavit states "that immediately prior to offering said land for sale said sheriff gave an explanation, as I understood, of the terms of said sale, and from said explanation I understood and believed that any

purchaser of said property took said property subject to the executions then thereon; that said sheriff thereupon offered for sale said land, when the same was knocked down to William T. Hind, he being the highest bidder therefor, for the sum of $25 . . . ; that immediately after the same was knocked down to said William T. Hind, I again asked the said sheriff to explain the terms of said sale, and upon my assuring the said sheriff that I understood the said William T. Hind was bidding the said property in, subject to said execution, he immediately put said land up for sale again, when the same was sold to said William T. Hind for the sum of $360, he being the highest bidder therefor."

Mr. Wylie in his affidavit, after stating what Mr. Barton said after the first sale occurred, says: "The sheriff then stated that he would re-open the sale, whereupon I immediately objected to the re-opening of the sale, on the ground that I was a bona fide purchaser on behalf of the said William T. Hind, and that the sale was completed and could not be re-opened; the sheriff stated that he would re-open the sale subject to my objection, and without prejudice to the sale already made, and again offered for sale the said property; I then asked permission to bid again for the property, on condition that any offer I should make would be without prejudice to the former purchaser; the sheriff stated that he would allow me to bid for said property under those conditions, whereupon I again bid at the said sale on behalf of said William T. Hind, and was declared purchaser of the property without prejudice to the former purchase of same."

Upon these facts Mr. William T. Hind asks that the sale to him of said land for $360 be not confirmed. By Rule 365 of the Rules of Court it is provided that where there are no bidders or no sufficient bid has been offered for the land to be sold, the sheriff may adjourn the sale. The sheriff, who is the auctioneer, may therefore withdraw the land from sale, and a bidder may withdraw his bid at any time before the fall of the hammer, but after the fall of the hammer neither party can withdraw, and the auctioneer is then the agent of both parties to carry out the sale.

Now in this case the bid of $25 was accepted, and the property sold to William T. Hind. Could the sheriff then re-open the sale because one of the parties attending the same had not bid because he had made a mistake as to the terms of the sale? How he made the mistake he says he made I can-

not imagine. The land was being sold under his execution. This was stated in the notice of the sale, and, although the sheriff says nothing in his affidavit as to what explanation he made of the terms of the sale, I cannot conceive that he said anything that would cause any one to believe that when he was selling property under an execution the purchaser would take the property subject to that execution.

Upon the right of the sheriff to re-open bids after the sale of the property by auction, it seems to me that the Imperial Act 30 & 31 Vict. ch. 48 is conclusive. That Act is in force in this province, and by sec. 7 it provides that the highest bona fide bidder at an auction sale under the authority of the Court, provided he shall have bid a sum equal to or higher than the reserved price (if any)—and there was no reserved price in this case—shall be declared and allowed the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land, either open the bidding, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be re-sold. The only ground put forward in this case is not such a ground as would shew any fraud or improper conduct, and therefore I would have no authority to open the bidding; and the auctioneer having no such authority, the first sale would be a binding one, and the second, which I am now asked to confirm, of no effect at all.

I must therefore refuse to confirm the sale of this land for $360 as asked for.

SASKATCHEWAN.

LAMONT, J. MARCH 6TH, 1908.

CHAMBERS.

MANSELL v. MOORE.

Summary Judgment — Rule 103 — Action for Purchase Money of Land—Covenant to Pay — Defence—Title of Plaintiff — Acceptance by Defendants — Terms of Contract.

Appeal by defendants from order of local Master at Saskatoon, under Rule 103 of the Rules of Court, allowing

the plaintiff to sign final judgment against the defendants for the amount claimed in the statement of claim.

J. A. Allan, Regina, for defendants.

R. W. Shannon, Saskatoon, for plaintiff.

LAMONT, J.:—The plaintiff sues the defendants on their covenant to pay the purchase money of certain lands sold by the plaintiff to the defendants, which covenant is contained in an agreement of sale bearing date 30th May, 1907. The defendants made the first payment, and this action is for the amount of the second instalment. The writ was issued on 19th December last. The defendants appeared and filed their statement of defence, in which they allege that "the plaintiff was not on the 30th day of May, 1907, or at any time since that date, the owner of the lands described in the second paragraph of the plaintiff's statement of claim, nor had he the right to enter into the said contract." The lands set out in the second paragraph of the statement of claim were the lands sold by the plaintiff to the defendants under the above mentioned agreement.

The plaintiff made application to the local Master for leave to sign final judgment under Rule 103, and filed his own affidavit, in which, after stating that the defendants were and are still justly and truly indebted to him in the amount set out in the statement of claim, and that, in his belief, there is no defence to this action, and that the appearance has been entered and the defence delivered for purposes of delay only, he sets out the following: "6. I am owner of or equitably entitled to the property comprised in the said agreement under a contract for the sale thereof from Herbert Acheson and others to William Henry Coy, which contract is now produced and shewn to me and marked exhibit B, and which has been assigned to me by the said William Henry Coy in writing. 7. All payments which have accrued due under the said last mentioned contract have been met, and the said contract is in good standing."

The defendants did not file any affidavit on the application, and the local Master made an order empowering the plaintiff to sign final judgment. From that order the defendants now appeal.

On an application for final judgment under Rule 103 the only question to be determined is whether there is a triable issue to go before the Court or not: Jacobs v. Booth's Distil-

lery Co., 50 W. R. 49. The merits of the case are not under consideration, and a complete defence need not be shewn. It is sufficient, as stated by the local Master, for the defendants to shew "a fair probability of defence" in order to be allowed to defend.

In the present case do the facts disclosed shew a triable issue to be determined? The defendants rely on the terms of the agreement between H. Acheson and others and W. H. Coy, which was produced by the plaintiff and marked as exhibit B to his affidavit. This agreement contains the following clause: "No assignment of this agreement shall be valid unless the same be for the entire interest of the purchaser, and shall be indorsed hereon, or permanently attached hereto, and approved by the solicitors for the vendors, and countersigned by the vendors or their duly authorized agents; and no agreement or conditions or relations between the purchaser and his assignee or any other person acquiring title or interest from or through the purchaser, shall preclude the vendors from the right to convey the said land to the said purchaser, on the surrender of this agreement and the payment of the unpaid portion of purchase money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said agents or other person as aforesaid." Indorsed on the agreement is an assignment from W. H. Coy to the plaintiff, and below the assignment there is written the following: "Approved, Acheson & Shannon, agents for approval."

It was contended by the defendants that there is no evidence to shew that this agreement was approved of by the solicitors for the vendors, or that it was countersigned by the vendors or their duly authorized agents, as required by the above recited clauses, and therefore the assignment to Coy was not an assignment which could be enforced against the original owners, Acheson et al., and, as the plaintiff must make title under this agreement, he is not in a position to compel the original owners to give him a title, and, not having an enforceable title himself, he cannot compel the defendants to pay for land to which they may never get title. I am of opinion that this defence is not open to the defendants. In their agreement with the plaintiff I find the following clause: "And it is further agreed that the purchasers hereby accept to the title of the vendor to the said lands, and shall not be entitled to call for the production of any abstract of title or proof or evidence of title or any deeds, papers, or

documents relating to the said property other than those which are now in the possession of the vendor." The word "to" after the word "accept" is evidently a printer's error. The plain intent of the clause is that the defendants accept the plaintiff's title to the lands set out in the agreement. By this clause they agreed to accept the plaintiff's title, and they cannot now be heard to dispute it.

This being the only ground of defence urged on behalf of the defendants, there is not, in my opinion, a triable issue to go before the Court.

The appeal will be dismissed with costs.

SASKATCHEWAN.

PRENDERGAST, J. MARCH 9TH, 1908.

TRIAL.

VOGAN v. BARRY.

Building Contract—Failure of Contractor to do Work within Time Agreed—Owner Stopping Work on Building—Express Promise to Pay for Work Done—Consideration—Benefit—Counterclaim—Damages.

Action for the price of work done and materials furnished by the plaintiff in the erection of a building for the defendant.

F. M. Brown, Saskatoon, for plaintiff.

R. W. Shannon, Saskatoon, for defendant.

PRENDERGAST, J.:—The plaintiff, who is a plasterer, agreed with the defendant to lath and plaster the third storey of the Butler hotel (Saskatoon), owned by the latter The plaintiff went to work, and some days after the lathing was completed the defendant put an end to the contract, by forbidding the defendant's men to go on further, and had the plastering done by another contractor.

The plaintiff now sues for the lathing which was completed, for the price of the plastering material which was on the premises when the men were told off, for wages for these men who did some preparatory work before being so told off, and for personal services in making things ready generally for the performance of the contract—in all $195.55.

This was in June. There was a great rush of settlers in the city. The defendant could not accommodate all those who applied daily for board and lodging, and so decided to add a third storey to the building. He says, "I wanted a quick job," and, "It was a hurried job." He adds: "He was to follow the carpenters with the lathing, and the lathing with the plaster, and he'd finish 4 or 5 days after the lathing —that's what he said. I might wait 2 or 3 days, not 4 or 5 days. It was a hurried job. He was to have completed before the 15th or 20th June."

From the above, and the general evidence, I have no doubt whatsoever—in fact the plaintiff practically admits— that he understood that the contract was one where each day was a matter of consideration, and where time was a most essential and strict condition.

The lathing was proceeded with with due despatch and completed in two days. After that there was a stop, owing to the plaintiff having no hard-wall plaster; and on Monday 18th June, after the plastering material had been laid down on the premises in the morning, when the men proceeded to go to work in the afternoon they were ordered off by the defendant.

Whether the defendant was justified in calling the contract off on the 18th depends on the length of time that the work had been then stopped, and this must be reckoned from the date when the lathing was completed—which is disputed.

I am quite satisfied, however, that the lathing was completed on Tuesday the 12th; not as late as Thursday the 14th. I consider that this was shewn even by Ireland, a lather who worked on the job, and was called by the plaintiff himself.

On this Tuesday, then, the plaintiff told the defendant he was not able to go on, on account of want of material, which, he says, he could not procure in the city. What was actually said is not a matter of much contradiction, the parties relying more on the date on which they respectively allege that the conversation took place.

Leaving out the evidence of both plaintiff and defendant, this conversation, I think, can be fairly summed up in Ireland's words: "Mr. Barry said he would wait a certain length of time. He said he would not wait long—he said a day or two, but he would not wait any longer. Mr. Barry wasn't in a temper to want to wait 4 or 5 days."

As to what followed, the defendant says: "I expected Vogan on Wednesday, and he didn't come, nor Thursday.

So I asked Mr. Evans to shew me his house, and I went with him on Thursday the 14th, and the lady said he was away, so I left her word for him to come down to see me next morning right away. On Friday he didn't come. On the Friday one of two other fellows who had been tendering, one of them being Mr. Forsyth, said he could go on right away, and I asked him if he had the material, and he said 'yes.' I then told Forsyth that I wouldn't decide that day, and to come the next day. I again waited, until Saturday forenoon. Then Forsyth came early. I made an agreement for plastering. He left, and returned with a load of material and men who started to work the lime. On Monday the 18th they started to plaster, and that same day Vogan and his men started, after Forsyth had started. They started in the afternoon. I saw some of Vogan's men, and told them then Vogan had broken the contract. I saw Vogan also that Monday, and told him that he had done enough for me so far, and that I would pay him for what work he had done."

There is evidence, though perhaps not quite conclusive, that hard-wall plaster, which was called for by the contract, could not be had in Saskatoon during that week; and also that the plaintiff inquired several times from the Saskatoon Forwarding and Storage Co. when the stuff would be in, and that it having arrived by train on Sunday the 17th, he took delivery with due despatch the following morning.

For all this, from the nature of the original agreement as above set forth, I think that, having heard nothing from the plaintiff from the Tuesday to the Saturday, after having called at his house on the Thursday, the defendant was justified in awarding the completion of the contract to Forsyth on that Saturday, and ordering the plaintiff's men off the work on the following Monday.

Now, is the plaintiff entitled to recover for the lathing? There was a special contract to lath and plaster at 32 cents a yard, and, no doubt, the circumstances under which the defendant has taken the benefit of the part performance, are not such as to raise an implied promise to pay for the work done notwithstanding the non-performance of the whole contract, under the rule laid in Munro v. Brett, 8 E. & B. 738. But there is more here, for the defendant himself says, "I told him . . . that he had done enough for me so far, and that I'd pay him for what work he had done." There is no promise to be implied here from the

taking over of the lathing by the defendant; but there is his express promise. It is as if he said: "You cannot construe from my actions alone an admission that I was substantially benefited by your part performance. But I voluntarily acknowledge it, and promise to pay for it." I think that this promise, coupled with the implied acknowledgment that he was benefited, entitles the plaintiff to recover for the lathing.

On the other items the plaintiff must fail.

With reference to the damages counterclaimed by the defendant, the only evidence on the point is his own, as follows: "I had accommodation for 30 or 40 in the third storey —I consider 50 cents a day for lodging alone—outside of bar and dining-room." I am at a total loss to say what the average profit or any profit in the bar or dining-room might have been; and as to the lodging, I do not know if 50 cents is meant for the net profit or the price to be charged. The defendant having allowed the plaintiff 2 days (i.e., up to the 14th) to complete the work, I will allow him on the counterclaim 25 cents on 30 boarders for 3 days (i.e., up to the 18th, when he took charge of the work), in all $22.50.

There will be judgment for plaintiff for $98.70, with costs. The plaintiff to be allowed to tax only his own witness fees, the other witnesses called by him having failed to give anything material beyond what was admitted in the statement of defence.

SASKATCHEWAN.

MARCH 20TH, 1908.

FULL COURT.

REX v. CODE.

Criminal Law — Vagrant — Summary Conviction—Illegal Costs—Power of Amendment—Omission to Provide for Costs of Commitment and Conveying to Gaol—Conviction for two Offences—Creating a Disturbance in the Street—Loitering in the Street—Criminal Code, sec. 238—Necessity for Specifying Particular Offence.

Motion by the defendant to quash his conviction for vagrancy.

H. Y. McDonald, for defendant.

F. Ford, K.C., for the convicting magistrate.

The judgment of the Court (WETMORE, C.J., NEWLANDS, PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

NEWLANDS, J.:—In this case a conviction by two justices of the peace under sec. 238 of the Criminal Code was removed into this Court by writ of certiorari. On the return of the writ the justices filed an amended conviction. It was then moved by Mr. McDonald, for the defendant, that this conviction be quashed. A number of grounds were urged why this conviction should be quashed, but I think it is only necessary for me to deal with the following ones.

First, that the conviction is bad because it condemns the defendant to pay illegal costs.

The original conviction condemned the defendant to pay $16.70 costs. These costs were set out in the conviction. The following items were objected to as illegal: Information $1, instead of 50 cents; for making up records, $1; writing material, 5 cents; rent of hall, holding court, $2; witness fees attending court, defendant, 7, $5.15. There is, in my opinion, no authority for charging any of these items. It was, however, argued by counsel for the Crown that it was not improper to include the defendant's witness fees. It is provided by sec. 735 of the Code that in every case of summary conviction the justice may in his discretion award and order in and by the conviction that the defendant shall pay to the prosecutor or complainant such costs as to the justice seem reasonable in that behalf. The only costs it would be reasonable to order the defendant to pay to the prosecutor would be the costs the prosecutor has sustained in obtaining the conviction. He does not pay the costs of summoning the defendant's witnesses, nor is he liable to them for their witness fees. It would, therefore, not be reasonable that defendant should have to pay such fees to him, and it is illegal to require the defendant by the conviction to pay such fees to the prosecutor. In the amended conviction put in, the costs are fixed at $13.15. A calculation based on the bill of costs in the original conviction shews that in the amended conviction all the items objected to as illegal are left out, excepting the item of $5.15 for defendant's witness fees. This item, as I have said, it is illegal to require the defendant to pay to the prosecutor.

We are, therefore, asked to quash the conviction because it requires the defendant to pay this illegal amount to the

prosecutor. The following cases were referred to: Regina v. Walsh, 2 O. R. 206; Regina v. Elliott, 12 O. R. 351. In the first case a sum of 7 cents was inserted in the conviction over and above the amount of costs fixed by the minute of adjudication; and in Regina v. Elliott a sum for rent of hall was charged. Both convictions were quashed on this ground, the Court holding in the first case that there was a variance between the conviction and the minute of adjudication; and in the second case that they could not amend, as there would then be a variance between the conviction and the adjudication. Both of these cases were decided before the amendment to the Code giving power to amend where the punishment was in excess of that which might lawfully be imposed. By sec. 1124 a conviction removed by certiorari is not to be held invalid in such a case, but the Court shall have the like powers in all respects to deal with the case as seems just, as are by sec. 754 conferred upon the Court to which an appeal is taken under the provisions of sec. 749. Section 754, amongst other things, gives the Court power to make such order as to costs to be paid by either party as it thinks fit. This, I think, gives us power to amend as to costs and to provide that the defendant is only to pay such costs as he is legally liable to under Part XV. of the Code.

Second, that the conviction is bad because it does not fix the "costs and charges of the commitment and of the conveying of the said William B. Code to gaol."

It was argued that the amount of these costs and charges not being fixed by the conviction, and it being directed that the defendant be committed to gaol until they were paid, and there being no way by which the gaoler could fix them, the defendant could not pay these costs and charges and thereby terminate his imprisonment.

Section 739 of the Code provides that the justice in and by the conviction may provide that in default of payment of the penalty, etc., the defendant be imprisoned, unless the same and the costs and charges of the distress and of the commitment and of the conveyance of the defendant to gaol be sooner paid. The form of conviction (form 33) is in the same words. The form of conviction (WW) in the Criminal Code, 1892, is in the same words, but the warrant of commitment (FFF) after the words "and costs and charges of carrying him to the said common gaol" contains the words "amounting to the further sum of ." These forms

in the Code of 1892 shew that it was not necessary to insert the amount of these costs and charges in the conviction, but that it was necessary to insert them in the warrant of commitment. As the form of the warrant of commitment (41) in the Criminal Code, R. S. C. 1906, omits the last words, "amounting to the sum of . . . ," it may be unnecessary now to insert the amount of these costs and charges in the warrant of commitment, but we have not got to decide that question. It is the conviction in this case that is said to be bad for omitting them, and from a perusal of the present Code, with the forms given therein, and of the Criminal Code, 1892, with the forms given there, I think it never was the intention that the amount of these costs and charges should have been put in the conviction, whatever it may have been necessary to put in the warrant of commitment.

Third, that the conviction is for two offences, and is therefore bad.

The conviction reads as follows: "Did unlawfully cause a disturbance in Main street and the store of one Lorimer in manner aforesaid, the said store being a public place, and did unlawfully loiter on said street and did obstruct passengers by using insulting language, thereby being a vagrant." Loitering on a street and obstructing passengers by using insulting language is an offence by sub-sec. (e) of sec. 238, and causing a disturbance on a street or public place by screaming, swearing, etc., is an offence by sub-sec. (f).

It was argued by Mr. Ford that the offence was that of being a loose, idle, and disorderly person or vagrant, and, as the defendant was convicted of being a vagrant, that being the description of the offence in the Act, it was sufficient, and it did not matter how many of the offences set out in clauses (a) to (l) in sec. 238 the defendant had committed; that, as the committing of one or more of them would make him a loose, idle, or disorderly person or vagrant, he was convicted of one offence, and the conviction was therefore good. In Rex v. Keeping, 4 Can. Crim. Cas. 494, Weatherbe, J., in reference to the same section, said: "207 (g) of the Code does not help the matter, as that sub-section creates no offence, but only indicates one of the many ways how a person may be a 'loose, idle, or disorderly person, or a vagrant,' and that is the proper way to charge an offence under that section."

This case has not been followed. In Rex v. Young, 2 E. L. R. 65, Graham, E.J., a Judge of the same Court as Weatherbe, J. (the Supreme Court of Nova Scotia), refused to follow it. In his judgment he says: "I am of the opinion that the paragraph (j) with its context constitutes an offence, and that the conviction properly states a charge under it, using the generic term which is applied to cover all the various acts from (a) to (l), i.e., the name which for convenience is given to a person committing any of those acts;" and he cites with approval Rex v. McCormack, 7 Can. Crim. Cas. 135, in which it was held by Hunter. C.J., "that a summary conviction for being a loose, idle person or a vagrant, without specifying in what the vagrancy consisted, under sec. 207 of the Code, was void for uncertainty." Hunter, C.J., said: "The conviction is clearly bad. You might as well charge the man generally with being a thief. The accused was entitled to know under what subsection of sec. 207 he was charged; that is, what the facts were on which the prosecutor relied." He also refers to Smith v. Moody, [1903] 1 K. B. 56. In that case the conviction followed the words of the Act, and in holding the conviction bad Lord Alverstone, C.J., at p. 60, said: "The second objection to the conviction is that it does not sufficiently specify the property of the respondent which the appellant is alleged to have injured, the only words used being 'did injure the property of' the respondent. I have come to the conclusion that this objection is good and must prevail. I was at first inclined to think that the defect was cured by sec. 39 of the Summary Jurisdiction Act, 1879, which provides that 'the description of any offence in the words of the Act . . . creating the offence, or in similar words, shall be sufficient in law; but on further considering the question, which is undoubtedly one of importance, it seems to me that it could not have been intended by that section to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by sec. 39 is that the offence itself need only be described in the words of the statute creating it. As was pointed out in the argument for the appellant, it clearly would not be sufficient to say, in a conviction for larceny, 'did steal the property of' the prosecutor without any further particulars; and, in my opinion, sec. 39 does not cure the omission

from a conviction of such particularity in the description and details of the offence as has always been required." If, therefore, a person cannot be convicted for being a "loose, idle, or disorderly person or a vagrant" without specifying what act of vagrancy under clauses (a) to (l) has been committed, then each of those clauses constitutes a separate offence, and the conviction is bad for convicting the defendant of two of them.

In this case, although two offences are attempted to be described, only one is properly described. By sub-sec. (f) it is an offence to cause a disturbance in a public place by doing certain things. Here he is convicted of causing a disturbance in a public place, but it is not stated how the disturbance was caused, and it is therefore impossible to tell whether the disturbance was caused in one of the ways that by sub-sec. (f) makes the causing of a disturbance an offence. This, however, does not, in my opinion, prevent the conviction from being bad. Two offences are set out in the conviction, although only one is properly described, and the defendant is convicted of "the said offence," so that it does not appear of what offence he is convicted, and only one penalty is imposed.

The original conviction does not help me in any way. By it the defendant is convicted for that he "did use abusive language and was drunk and disorderly in the street, contrary to sec. 238 of the Criminal Code." This is a mixture of clauses (e) and (f), but does not contain some of the necessary ingredients required by both sub-sections, and was therefore clearly bad. But that conviction and the amended conviction shew that the justices intended to convict under both (e) and (f), so the improperly described offence cannot be considered as surplusage, and be rejected, leaving the part that is good effective. If this were done, it would be making a different adjudication from that come to by the justices, and the Court has no power to do that.

The conviction should therefore be quashed, but without costs.

SASKATCHEWAN.

MARCH 20TH, 1908.

FULL COURT.

PURDY v. COLTON.

Execution — Homestead Exemption — Claim by Execution Debtor for Benefit of Mortgagees — Money in Court — Payment out.

Appeal by defendants Lambert and Colton from order of NEWLANDS, J., 5 W. L. R. 439, upon a motion for payment to the sheriff of money in Court, being the surplus proceeds of a sale of lands of defendant under a mortgage to plaintiff, after satisfaction of plaintiff's mortgage and a second mortgage, directing that the money in Court be paid out to the sheriff for the execution creditors.

W. M. Martin, Regina, and Casey, Regina, for the appellants.

H. V. Bigelow, Regina, for the respondents the Smith and Ferguson Co. and J. N. Stewart.

J. A. Cross, Regina, for the respondents the Regina Trading Co., George Michaelis, J. R. Marshall, and W. H. Duncan.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

LAMONT, J.:—The first point requiring decision in this appeal is whether the surplus of $596.94 now in Court can be considered as the proceeds of the debtor Colton's homestead. The homestead was mortgaged along with two other quarter sections to the plaintiff and to the Fairchild Co., and the 3 quarter sections were sold to satisfy the said mortgages. If this money cannot be considered as being the proceeds of the sale of the homestead, and therefore exempt from seizure, it is clearly available for those execution creditors who had copies of their executions filed in the land titles office prior to the registering of the mortgages now held by the defendant Lambert.

The contention of the defendants Colton and Lambert is that this sum is not available for execution creditors because part of the land sold—one quarter section—comprised the homestead of the defendant Colton, and was therefore exempt from seizure under the executions, and the sum in Court, being much less than the value of the homestead, must therefore be considered as also being exempt in so far as the execution creditors are concerned. On the other hand the respondents (the execution creditors) contend that the fund in Court is part of the proceeds of the sale of the whole 3 quarter sections, and not the homestead alone; that the moneys are inseparable; and that, therefore, one portion cannot be considered as the proceeds of the sale of the homestead any more than it can be considered as the proceeds of the sale of the non-exempt lands.

The claim for exemption by the defendant Colton is made under C. O. ch. 27, sec. 2, sub-sec. 9, which reads as follows: "2. The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely: . . . (9) The homestead, provided the same be not more than 160 acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon."

A homestead within the meaning of the Exemption Ordinance, as its name imports, is the home-place, the place where the home is, the actual residence of the debtor and his family. It includes not only the dwelling-house but also the adjoining land occupied and used therewith. This dwelling-house and the surrounding land, to the extent of 160 acres, is free from seizure under execution; the surplus of the land, however, although used and occupied by the debtor as part of his farm, may be sold under the executions. In this case the debtor Colton owned and occupied 480 acres. As against the execution creditors he was entitled to an exemption of 160 acres. The other 320 acres might be sold under the executions, but, if sold, had to be sold "subject to any lien or incumbrance thereon,"

The incumbrances on the 320 acres which were registered prior to the filing of the executions of the respondents in the land titles office were the mortgages to the plaintiff Purdy and the Fairchild Co. The rights of the execution creditors, therefore, against Colton's land consisted, it seems

to me, simply of the right to sell the 320 acres subject to the Purdy and Fairchild mortgages. These mortgages cover the other 160 acres claimed as a homestead as well, but, notwithstanding that fact, the entire amount of each mortgage was chargeable against the 320 acres not exempt and was an incumbrance thereon. And, as the Ordinance specifically states that this surplus land available for execution creditors was to be subject to the incumbrances, I am of opinion that the claims of the execution creditors must be confined to the surplus proceeds, if any, of the sale of the non-exempt 320 acres, after payment of the Purdy and Fairchild mortgages. These two mortgages, together with the plaintiff Purdy's costs, amounted to some $7,900. There is no specific evidence as to the value of the 2 quarter sections which were not exempt. The whole 480 acres, however, sold for $8,500. The evidence before the Court as to the respective values of the quarter sections claimed as a homestead, and the other two quarter sections, is an affidavit by Colton filed in support of his claim to have the southwest quarter declared exempt, in which he swears that the value of this quarter section and the buildings thereon was $4,000 This is the only evidence, but I am satisfied that the proceeds of the two quarter sections not exempt were not sufficient to satisfy the Purdy and Fairchild mortgages, and, that being so, there is nothing to which the claims of execution creditors could attach.

This case seems to me to come within what was laid down by the Supreme Court of the North-West Territories en banc in Re Demaurez, 5 Terr. L. R. 84. In that case it was held that on the sale of land under order of the Court, part of which was exempt from seizure under executions and part not, and the whole subject to two mortgages, the debtor, as against his execution creditors, was entitled to the full amount of the exemptions allowed him by the Ordinance, out of the proceeds of the sale after payment of the mortgages. I am, therefore, of opinion that the money now in Court should be considered as the proceeds of the debtor Colton's homestead and exempt from seizure under the executions.

It was, however, contended that, even if the money in Court was to be considered as the proceeds of the sale of the homestead, the debtor Colton could make no claim thereto, for the reason that, as the Exemptions Ordinance was passed for the benefit of himself and family, his right to exemp-

tions depended on whether or not he or his family would derive any benefit from the claim made, and in this case, as the money will go to the mortgagee Lambert, if not to the creditors, it was argued that there are no exemptions for him to claim.

I find myself unable to agree with this view. I agree that the Exemption Ordinance was passed for the benefit of the debtor and his family, but the manner in which he was to be benefited was by making his homestead exempt from seizure so long as he retained it as a homestead. The test to be applied to determine whether or not it is available for the execution creditors is not whether the debtor derives or can derive any benefit therefrom, but, is it his homestead? If it is his homestead, the Ordinance says it is exempt. In protecting the homestead of the debtor from seizure under execution, the legislature did not interfere with his right to mortgage or incumber it, or to deal with it in any way he might choose, without thereby causing it to lose its exempt character, so long he did not voluntarily convert it into property which was not entitled to the protection of the Exemption Ordinance: Bocz v. Spiller, 1 W. L. R. 366. Having, therefore, the right to mortgage his homestead without thereby depriving it of its exempt character, I fail to see how it can lose that homestead character because the debtor, in the exercise of a right allowed him by law, incumbers it in an amount which leaves him no equity of redemption, should the property be sold at a forced sale. In my opinion, so long as the land remains the homestead, the actual residence, of the debtor and his family, and he does not waive his right thereto, it is beyond the reach of the execution creditors.

On the question whether or not a mortgagee can claim the exemptions which the law allows his mortgagor, I do not think it necessary to express an opinion in this case. The question would be material if the debtor Colton expressly waived his right to the exemptions; but, instead of abandoning his rights thereto, he expressly claims them, and, even if he did not claim them, it is the duty of the sheriff to leave the exemptions which the law allows: Re Demaurez, 5 Terr. L. R. 84 (McGuire, J.): and, the exemptions being left, they are available for any one to whom the execution debtor has given a lien thereon.

The money in Court, therefore, being exempt from seizure under the executions, becomes available for the mort-

gagee Lambert, not because he can claim exempt property covered by his mortgage—on that point I express no opinion—but because the execution creditors, who are the only ones disputing his right thereto, have no claim whatever on the fund.

The appeal, therefore, should be allowed with costs.

SASKATCHEWAN.

MARCH 20TH, 1908.

FULL COURT.

LEIB v. LEIB.

Husband and Wife—Action for Alimony—Adultery of Wife —Bar to Action.

Appeal by plaintiff from judgment of NEWLANDS, J., 6 W. L. R. 392, dismissing an action for alimony.

R. Rimmer, Regina, for the plaintiff.

W. M. Martin, Regina, for the defendant.

The judgment of the Court (WETMORE, C.J., PRENDERGAST and LAMONT, JJ.), was delivered by

WETMORE, C.J.:—This is a suit instituted by Lizzie Leib under ch. 29 of the Consolidated Ordinances against her husband, Karl Leib, to recover alimony, on the grounds of desertion, cruelty, and adultery on his part. The matter came on for trial before my brother Newlands, who found that the desertion and adultery were proved. He also found that the plaintiff was guilty of adultery with one Walter Albright subsequent to the desertion of her by her husband. The evidence quite warranted the learned Judge in coming to these conclusions. The evidence on the part of the plaintiff established that the defendant was in the habit of coming home drunk; that he frequently struck her with his fist and pulled her hair, and on one occasion when she hid under the bed he pulled her out by her hair. The defendant also used most infamous language to her, calling her a whore and a

bitch and names of a similar character. In consequence of this treatment the plaintiff ceased to cohabit with the defendant. I assume that the learned Judge gave effect to the testimony of the plaintiff and her witnesses in respect to those matters. There was also evidence to establish that the defendant had committed adultery with one Eleanor Wolff, but at what time this adultery took place, is not perfectly clear, nor whether it was before or after the plaintiff left her husband.

The marriage between the parties took place on 15th April, 1906. The plaintiff left her husband on account of his conduct in September or October in the same year; I should judge the middle of October. The adultery of the plaintiff with Albright took place shortly before Christmas of the same year. The learned Judge dismissed the action with costs, on the ground that the plaintiff's adultery was a bar to her right to recover, and the plaintiff appealed.

The jurisdiction of this Court to entertain an action for alimony rests upon ch. 29 of the Consolidated Ordinances, before referred to. This Ordinance was first introduced in 1895, as No. 14 of that year, and the wording of that Ordinance and the one in the Consolidated Ordinances is identical. It would be observed that the jurisdiction to grant alimony arises in three cases: (1) to any wife who would be entitled to alimony by the law of England; (2) to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto; (3) to any wife whose husband refuses to support her, without any sufficient cause, under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

As to the first case mentioned, I have some difficulty in construing the Ordinance. At the time that the original Ordinance was passed in 1895, the Imperial Act 20 & 21 Vict. ch. 85, being the Matrimonial Causes Act, 1857, was in force, and the Ordinance had reference, in a great measure, to the state of the law of England on the subject, and the same state of affairs existed when the Consolidated Ordinances were passed. Now, leaving out the second and third cases in which alimony may be granted, as I have before stated, under what circumstances would a wife by the law of England be entitled to alimony? In using the word "divorce" in their Ordinances, the Legislative Assembly must, I conceive, have used the word as it was understood by the law of England. Prior to the passing of the Imperial Act, there were two descriptions of divorce: one a mensa et

thoro, the other a vinculo matrimonii. Section 7 of the Act practically abolishes what was known as a divorce a mensa et thoro, and substitutes for it a decree for judicial separation, which has the same force and the same consequences that a divorce a mensa et thoro had. Where the legislature, therefore, uses the word "divorce" in the Ordinance, it must mean a divorce a vinculo matrimonii. I can find no cases where, in England, alimony has been granted as a mere abstract right. It is granted as an incident to a suit. Formerly, before divorce a mensa et thoro was abolished, it was granted as an incident to relief granted to a successful suitor, usually where a wife had been successful in obtaining such a divorce from her husband, and similar consequences would still follow where a judicial separation has been decreed. The first case I have instanced as a ground for granting alimony must be construed to stand outside what is provided for in the second and third cases. I have stated that I know of no cases where it is granted as an abstract right. I may refer to Ball v. Montgomery, 2 Ves. at p. 195, where the Lord Chancellor lays down as follows: "It is contrary to the established doctrine that a married woman should be the plaintiff in a suit in this Court for separate maintenance, ... and I take it now to be the established law that no Court, not even the Ecclesiastical Court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision." The question then arises: Would the plaintiff, under the circumstances, be entitled to a decree for judicial separation if the parties were in Great Britain or Ireland? I hold that she would not. The principles upon which decrees for judicial separation are granted them, do not, so far as I can discover, differ from the principles upon which the Ecclesiastical Court formerly granted a divorce a mensa et thoro. I find stated in Browne & Powles on Divorce and Matrimonial Causes, 7th ed., p. 74, the following: "The Ecclesiastical Court withheld from a guilty husband the remedy against a guilty wife, and vice versa, unless there were extenuating circumstances. But they recognized no distinction between a delinquency of one party committed before or after the other party's infidelity in its complete efficiency as a "bar to a claim for relief." The Ecclesiastical and Consistory reports cited for this proposition are, unfortunately, not available to me. I hold

that a wife's adultery would be a bar to her obtaining a judicial separation in England, and, therefore, a bar to the right to recover alimony in so far as the first case mentioned is concerned.

As to the second case mentioned, the Imperial Act has very materially altered the law with respect to divorce from the bond of matrimony. Section 27 provides: "It shall be lawful for any wife to present a petition to the said Court praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery or of bigamy with adultery, or of rape, or of sodomy or bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion without reasonable excuse, for two years or upwards." Therefore, the plaintiff would, in England, have been entitled to a divorce because the defendant had been guilty of adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce a mensa et thoro, provided that her own adultery would not be a bar to such a decree. Section 31 provides that "in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved; provided always that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery." It will be observed, therefore, that the power to grant or refuse a decree if the petitioner has been guilty of adultery is entirely discretionary with the Court, and that is all that Gooden v. Gooden, [1892] P. 1, established, in so far as that case is pertinent to this one. That being so, I hold that in England, under the circumstances of this case, the Court there, in the exercise of its discretion, would not grant a decree for divorce; nor would it, in the exercise of its discretion, grant a decree for alimony. I am of the opinion that these parties, if I may use the expression, are a bad lot all round, and I apply to the plaintiff the language used by Jeune, P., in Squire v. Squire, [1905] P. at p. 8: "Still her subsequent course of conduct has been

so mistaken . . . that I am afraid that it was caused not by his former cruelty towards her but by her own inherent wickedness . . . Her adultery was not caused directly, at any rate, by his cruelty, but was brought about because she was tempted and yielded to the temptation." Moreover, a young woman as she is would have no difficulty in obtaining work in this country. The evidence established that she was earning good wages since she left her husband, and, therefore, I cannot find that she was practically unable to earn her living or to obtain support, as was held by Gorrel Barnes, J., in Ashcroft v. Ashcroft, [1902] P. at p. 273.

As to the third case, I think it is very clear that she would not be entitled to a decree for restitution of conjugal rights by the law of England. In Hope v. Hope, 27 L. J. P. 43, the Judge Ordinary, in a very lengthy judgment, held that a suit for restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery.

For these reasons, I am of the opinion that this appeal should be dismissed with costs.

SASKATCHEWAN.

MARCH 20TH, 1908.

FULL COURT.

JACKSON v. CANADIAN PACIFIC R. W. CO.

Practice—Ex Parte Order—Right of Judge to Rescind—Appeal—Rules of Court — Order Allowing Defendants to Plead other Defences with "Not Guilty by Statute."

Appeal by plaintiff from an order of WETMORE, C.J., in Chambers, discharging a summons to set aside an ex parte order made by WETMORE, C.J., allowing defendants to plead other defences with "not guilty by statute."

W. Trant, Regina, for plaintiff.

J. A. Allan, Regina, for defendants.

The judgment of the Court (NEWLANDS, PRENDERGAST, and JOHNSTONE, JJ.), was delivered by

NEWLANDS, J.:—The ground upon which this order was made was that a Judge has no power to set aside his own ex parte order. In his written opinion the learned Chief Justice relied upon In re St. Nazaire Co., 12 Ch. D. 80. With deference to that learned Judge's opinion, I am unable to see that that case has any reference to the present. There, according to the statement of facts as set out in the report, a summons was taken out, and, "after full argument," an order was made; this order was appealed from and the appeal dismissed with costs. A petition was afterwards presented to a Judge asking that this order be discharged. Jessel, M.R., in giving judgment, said (p. 96): "It is a petition presented to a Judge of the High Court to rehear a decision of the Appeal Court. I should have thought that the mere statement of that would be sufficient to shew that the Judge below had no jurisdiction. It would be a wonderful result, indeed, if the Judicature Act empowered a Judge of an inferior Court to rehear a decision of the Appeal Court, which perhaps had reversed his decision. Upon that theory how long is the thing to go on? If the Judge below has this power, he may exercise it by reversing the decision of the Appeal Court where the Appeal Court had reversed his decision."

I need not refer at any greater length to this decision to shew that it has no reference to an ex parte order granted without any opportunity being given to the other side to present their side of the case.

The learned Chief Justice also referred to Chitty's Archbold's Practice, 14th ed., pp. 1398 and 1415. These references undoubtedly refer to considered orders granted on the return of a summons after hearing both sides, as the learned author in a note to p. 1398 says: "This rule against opening or rescinding rules made after hearing both parties did not apply to rules which were made absolute in the first instance. The party against whom such rules were made absolute might move to discharge them on shewing sufficient reasons why they should not have been granted." And on p. 1418 he says: "When a party alleges that an order has been improperly obtained against him ex parte, the proper course, it seems, is to apply to the Judge

who made the order to review it;" and he cites as authority for the statement Daniel v. Clapham, 63 L. T. Jour. 7.

The learned Chief Justice also refers to sec. 50 of ch. 50, R. S. C. 1886, which says that "the Court sitting en banc shall hear and determine all applications for new trial, all questions or issues of law, all questions or points in civil or criminal cases reserved for the opinion of the Court, all appeals or motions in the nature of appeals, all petitions, and all other motions, matters, or things whatsoever, which are lawfully brought before it;" and he considers that the legislature never intended to give a Judge jurisdiction to sit on appeal from his own order under any circumstances except those provided by Rules 198 and 497. Now, there is no question but that the learned Chief Justice would be right if this application was an appeal. In my opinion, it is not. When the judgment or order of a Judge is appealed from, it is because the party appealing believes that the Judge was wrong. This is not the case on an application to set aside an ex parte order. There the Judge, on the facts presented to him, may have been perfectly right, and if the order was appealed to a higher Court, that Court might on those facts be able to make no other order. The party against whom the ex parte order was made would have no right to present his side of the case to the Court of Appeal; as that Court under our Rules (507) has only power "to receive further evidence on questions of fact as to matters which have occurred after the date of the decision from which the appeal is brought." It would, in my opinion, be contrary to all rules of justice that a party should be bound by an order which was made without his having any opportunity to present his side of the case, and, as he cannot do this on appeal excepting as to matters which have arisen subsequently to the order, he should have the right to a hearing before the Judge who made the order. If we proceeded in any other way, we should, as Park, J., said in Clark v. Stockton, 2 Bing. N. C. 651, be called on by the opponents to this order to proceed in a way contrary to the fixed principles of justice, which require that before decision both parties should be heard.

The principal cases cited by the respondents were In re St. Nazaire Co., to which I have already referred, and McNab v. Oppenheimer, 11 P. R. 214, where Rose, J., held that he had no jurisdiction to reconsider his own order or to rescind it. The authorities cited by that learned Judge do

not, in my opinion, bear out that decision, and I cannot therefore agree with it. It is true that in the cases cited by him the learned Judges may have expressed opinions that were not necessary on the facts stated in those cases, but at all events they are the opinions of very able Judges and as such are of great assistance to me in coming to an opinion. In Kidd v. O'Connor, 43 U. C. R. at p. 200, Harrison, C.J., said: "There is nothing to prevent an application being made to a Judge to rescind his own order when made ex parte; and in such a case it is not improper to make application to the Judge before applying to the Court by way of appeal." And in Day v. Vinson, 9 L. T. N. S. 654, Pollock, C.B., said: "If the certificate which has been granted is irregular, it is to be presumed that Erle, C.J., on application, will set it aside. We cannot entertain an application to review or set aside an order made by a Judge on an ex parte statement, before an opportunity has been given to the Judge, by an application to him for that purpose, to amend his own order if he thinks fit so to do, after hearing both sides."

This practice has also been followed in our own Courts. In Lougheed v. Praed, 1 Terr. L. R. 253, which was an appeal from an order made by Rouleau, J., discharging a summons to set aside an order made by him ex parte, the Court held that the order should not have been made ex parte, and allowed the appeal. In this case there was no appeal from an ex parte order, and the question does not seem to have been raised that a Judge had no power to set aside his own ex parte order, and I can only cite it to shew that the Court by allowing the appeal from the order refusing to set aside the ex parte order, were of the opinion that the Judge was wrong and should have set aside his ex parte order where it was improperly granted.

As the learned Chief Justice states in his opinion, the order should not have been granted ex parte in this case, but only on summons, and he says he made the order inadvertently; quite apart, therefore, from the question of the right of a Judge to set aside his own ex parte order, the Chief Justice had the power to set it aside under Rule 538 of the Judicature Ordinance. This Rule is: "Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void unless the Court or a Judge

shall direct, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the Court or Judge may think fit."

It is provided by Rule 113 that nothing in the Judicature Ordinance shall affect the right of a defendant to plead "not guilty by statute," but, if he so pleads, he shall not plead any other defence without the leave of the Judge. By Rule 458 it is provided that applications for summonses. Rules, or orders to shew cause, and applications authorized to be so made by these Rules, may be made ex parte. Other motions in Court shall be by notice of motion and other applications in Chambers by summons except where otherwise specially provided. The application to plead other defences in addition to "not guilty by statute" is not authorized by the Rules to be made ex parte, and under Rule 458 it should be, therefore, made by summons, and, as this Rule was not complied with, it would be irregular, and under Rule 538 could be set aside: see notes to Annual Practice under Order lxx., Rule 1.

The irregularity in this case is one which I think should not be waived. Before the Judge gives leave to a defendant to plead other defences in addition to "not guilty by statute," both parties have a right to be heard, and the Judge should have before him the other defences intended to be pleaded. In this case defences are pleaded which in other cases have not been allowed to be pleaded in addition to "not guilty by statute:" see Smith v. Canadian Pacific R. W. Co., 21 C. L. T. Occ N. 194; Daniel v. Canadian Pacific R. W. Co., 6 W. L. R. 538; and, as long as the order allowing them to be pleaded stands, they could not be struck out. The only way in which the plaintiff can have these improper defences struck out is on a rehearing of the ex parte order which allowed them to be pleaded. The appeal should, therefore, be allowed, and the order allowing the defendants to plead other defences in addition to "not guilty by statute" be set aside with costs.

SASKATCHEWAN.

JOHNSTONE, J. MARCH 20TH, 1908.

TRIAL.

McLORG v. LOPPE.

Gift—Personal Property—Death of Donor—Action by Administrator to Recover from Donees—Evidence.

Action by the administrator of the estate of Bertholdt Herman Loppe senior, deceased, to recover certain personal property as belonging to the estate.

H. Y. McDonald, Moosomin, for plaintiff.

W. W. F. Harris, Arcola, for defendant.

JOHNSTONE, J.:—This action was brought by Edward A. C. McLorg, administrator of the estate and effects of Bertholdt Herman Loppe senior, deceased, who at the time of his death, which occurred on or about 20th February, 1907, and for some years prior thereto, resided on the west half of section 14, township 2, range 3, west of the 2nd meridian, in the province of Saskatchewan. Prior to 24th July, 1906, the deceased owned the quarter section referred to, as well as other lands, namely, the east half of section 14, the south-east quarter and north-west quarter of section 10, in the same township and range. On 24th July, 1906, the deceased by deed transferred the west half of section 14 to the defendant, the east half of that section to his son Gustave Loppe, and the portions of 10 owned by him he transferred by deed to the defendant in trust to convey the same to her brother William on his attaining 21 years. These three children were the only children who had resided with the deceased for some years prior to the time of his death. The deceased was also the owner of certain personal property, particularly set out in the statement of claim, which property the plaintiff seeks to recover from Ida Loppe and her brother Gustave Loppe, as belonging to the estate of the deceased. The defendant, Ida Loppe, and her brother Gustave Loppe, averred that this property had been given to them by the deceased at the time of the transfer of the real estate.

Ida and her brother Gustave remained on the lands after the death of their father and worked the same as they had before the transfer to them of the real estate, but no action has been taken to set aside the conveyances of the real estate.

The trial took place before me at Arcola on 17th January, 1908, and several witnesses were called to give evidence relating to the matters in question. Frank Boetcher said the deceased in March, 1906, in a conversation at his own house, stated that he wanted to give his land to the children who had lived with him; that the cows and the pigs and other things in the house he had given to Ida, and his horses and machinery to Gustave and Ida. In the month of August, 1906, the deceased told the same witness that he had already given the land to his 3 children, Ida, Gustave, and Willie, for which they had agreed to give him $400 a year, and that the personal property had been divided between Gustave and Ida, and he regretted that he had not had papers made out transferring the personal property to these children. He further said that he had given Ida horses and machinery to work the land, and Gustave the same, and Willie was to have a team when of age, and that, after the conversation referred to, he had traded cows with the deceased, two in number, but that the deceased first consulted with the defendant to ascertain if she was agreeable to the exchange, and on obtaining her consent made the trade. Elizabeth Boetcher and Christian Reineka gave evidence to the same effect. Mr. Teed, solicitor of Alameda, also gave evidence, in which he stated that he had drawn up the transfers of the property at the request of the deceased, and that the same were signed in his office at Alameda on 24th July, 1906, at which time he had received instructions from the deceased to prepare a bill of sale to Ida and Gustave of all the property in question, save one horse and colt, but that, owing to the lateness of the instructions given, the necessary documents could not be prepared but were left for future attention.

Gustave Loppe swore that the father had made disposition of the personal property to him and his sister about the time of the execution of the transfers, and this was in pursuance of a statement he had made prior to 24th July; that he was about to divide the personal property between the witness and the defendant; and the father further said that he was going to Mr. Teed's office for the papers, and to have the land and personal property transferred over as

intended; that it was agreed between the 3 that the 2 children should each pay to the father $200, and assume all debts owing by the father, including the mortgages on the real estate, amounting to something over $3,000. This arrangement as to the payment of $200 and the assumption of the debts was contained in the deed of transfer, and the transferees therein covenanted with the deceased to assume the mortgage debts and to pay the deceased annually during his lifetime, on 1st November in each year, the sum of $200, beginning with the year 1907, and to devote the net surplus of the crop on the lands transferred to paying off the liabilities of the father after deduction of living expenses. The defendant stated in giving her evidence that the deceased had told her on 21st July that he wanted to go to Mr. Teed's office and get the real and personal property assigned over; that the personal property, including the goods and chattels hereinbefore referred to, had been delivered over to the defendant and her brother the day of the execution of the transfer, from which date these parties had the sole management of the farm and the disposition of the crop grown thereupon, and that the deceased thereafter took no part in the management.

It appears from the evidence that it was the intention of the father that the personal property on the farm should become the property of the defendant and her brother, and he frequently after 24th July, and prior to his death, expressed a desire to have writings prepared and signed by him shewing the transfer of this property to these parties, so that no trouble could possibly arise in case of his death. There was a total absence of evidence of undue influence, and the transfers and the handing over of the personal property were apparently made on the sole suggestion of the father.

The evidence satisfies me that the deceased at the time the property was transferred fully understood what he was doing; that he afterwards approved of what he had done; that the documents were prepared and executed deliberately and at his own suggestion, and without any solicitation on the part of the defendant or her brother or of any other person.

The circumstances of this case are somewhat similar to those in Re Johnson, 20 Ch. D. 389; and in Empey v. Fick, 9 O. W. R. 73, the learned Chancellor, at p. 76, is reported to have said: "If it be that the old man was sus-

ceptible of being swayed by importunity, there is no evidence that any such pressure or solicitation was used in order to procure or induce his signature. The disposition of property was a reasonable one to make; it was entered upon without haste or secrecy or importunity—it was carried out in accordance with the often expressed intention of the father continued down to the time of its completion."

I may also refer to Fowler v. Robson, 11 O. W. R. 481, and the cases cited there.

There will be judgment for the defendant for all the property mentioned in the statement of claim, save and except the horse and colt which were the property of the deceased at the time of his death and which now belong to the estate, and were not claimed by the defendant at the trial, and for which the plaintiff is entitled to judgment, but without costs. As the defendant has been substantially successful in the action she will have the general costs thereof.

SASKATCHEWAN.

WETMORE, C.J. MARCH 25TH, 1908.

CHAMBERS.

PRINCE v. RICHARDS.

Summary Judgment—Rule 103—Defence—Denial—Unconditional Leave to Defend—Pleading.

Application by plaintiffs under Rule 103 of the Judicature Ordinance for leave to enter judgment against the defendant for the amount of the plaintiffs' claim. The action was brought to recover the price of a quantity of lumber alleged to have been sold and delivered by the plaintiffs to the defendant.

A. S Gordon, Regina, for the plaintiffs.

J. C. Secord, Regina, for the defendant.

WETMORE, C.J.:—An affidavit of Angus J. McCormick was read on behalf of the plaintiffs, which verified the statements of claim and defence and testified as to the position

in which the plaintiffs' books were. The sale and delivery to the defendant were verified by the affidavit of J. Alphonse Prince, one of the plaintiffs, with affidavits from one Storer and one Thomas, which may possibly tend to corroborate the affidavit of Prince. But the defendant has distinctly sworn that he never ordered the lumber, and, if the goods were ordered and charged to his account, there was no authority for doing so, and the lumber was never delivered to him or any of his servants or agents. I cannot try this action out on this application, and the defendant has sworn to quite sufficient to allow him to defend it.

I may say that the defendant's plea which denies that he ever was indebted to the plaintiffs as alleged is bad as being too general. However, as this application is not to strike the plea out as being embarrassing or otherwise, I cannot strike it out on this application.

This application will be refused. The costs of each party to it to be costs in the cause.

SASKATCHEWAN.

WETMORE, C.J. MARCH 26TH, 1908.

CHAMBERS.

CRAFTSMEN v. HUNTER.

District Court—Jurisdiction—Action to Enforce Mechanic's Lien—Lien Filed before District Court Act Came into Force—Judicature Act—Mechanics' Lien Act—Jurisdiction of Supreme Court of Saskatchewan.

Application by plaintiffs under Rule 103 of the Judicature Ordinance for leave to sign judgment against the defendant. The action was brought in the District Court for the judicial district of Regina. The amount of the claim was $346.51; and the labour and material in question were supplied about 18th July, 1907. The claim for lien was registered in the land titles office at Regina on 17th August, 1907, and the action was commenced on 19th November last.

A. L. Gordon, Regina, for the plaintiffs.

F. W. G. Haultain, K.C., for the defendant.

WETMORE, C.J.:—It is set up in answer to the action that the District Court has no jurisdiction to entertain it. I am of opinion that this objection is well taken. The District Court Act did not come into force until 16th September last, after the mechanic's lien was filed; consequently it was filed under C. O. ch. 59, and sec. 25 of that Ordinance provides that "in all cases the lien may be realized in the Supreme Court in the judicial district in which the land charged is situated according to the ordinary procedure of that Court." Of course, that meant the Supreme Court of the North-West Territories, which was the only Supreme Court then in existence here. Section 14 of the Judicature Act, 1907 (which also came into force on 16th September last), provides as follows: "The Supreme Court of Saskatchewan, in addition to any other jurisdiction, rights, powers, incidents, privileges, and authorities which immediately prior to the coming into force of this Act were vested in or capable of being exercised within the province by the Supreme Court of the North-West Territories, shall possess the jurisdiction which in England prior to the Supreme Court of Judicature Act, 1873, was vested in or capable of being exercised by" certain Courts in England mentioned in the section. That vests in the Supreme Court of Saskatchewan all the jurisdiction, rights, etc., which immediately prior to the coming into force of that Act were vested in the Supreme Court of the North-West Territories. The District Court, having only jurisdiction in money demands or for enforcing damages up to $300, would have no jurisdiction over this claim, it being over $300, and being an action in which the title to land is brought in question, unless it was specially given to it by the District Court Act or some other Act. Section 30 of ch. 21 of the Acts of 1907 (the Mechanics' Lien Act) gives the jurisdiction to the District Courts to deal with the realization of mechanics' liens, irrespective of the fact that the title of the land may be brought in question or that the amount involved is over $300, and sec. 38 provides, in effect, that where such an action is brought, and the plaintiff fails to establish a valid lien, he may recover a personal judgment against the defendant to the action for such sum as may appear to be due to him irrespective of the amount. But sec. 41 provides as follows: "Nothing in this Act contained shall be construed to affect any mechanic's lien filed or the rights or liabilities of any person by or against whom or

against whose property any mechanic's lien has been filed prior to the coming into force of this Act; and all such liens may be enforced in the same manner as though this Act had not been passed." This Mechanics' Lien Act also came into force on 16th September. What then was the position of matters, in so far as the question I am discussing is concerned, just before all these Acts came into force? The plaintiff's lien was registered under the Mechanics' Lien Ordinance of the Consolidated Ordinances. The Supreme Court of the North-West Territories had the jurisdiction to enforce the lien and the amount claimed. The Mechanics' Lien Act, 1907, by sec. 41, which I have just cited, left this right uninterfered with, except in this respect—that the jurisdiction was transferred to the Supreme Court of Saskatchewan. Consequently, the parties to the lien had the right to have their rights or liabilities adjudicated upon by the higher tribunal, and the lien allowed to be enforced in the same manner as though the Mechanics' Lien Act had not been passed. Suppose that Act had not been passed, where would the right to enforce this lien be? Clearly in the Supreme Court of Saskatchewan.

This application, therefore, must be dismissed with costs.

SASKATCHEWAN.

WETMORE, C.J. MARCH 30TH, 1908.

CHAMBERS.

RE MILLER AND AMERICAN-ABELL ENGINE AND THRESHER CO. AND WEBSTER.

Chose in Action—Assignment of—Order for Payment of Money—Validity as Assignment—Signature of Assignor—Assignment of Future Debts, Validity of—Previous Assignment—Priority—Notice—Judicature Ordinance—Interpleader—Costs.

Summary trial of an interpleader issue.

T. S. McMorran, Regina, for the company.

Alexander Ross, Regina, for Webster.

WETMORE, C.J.:—In April, 1905, the American-Abell Engine and Thresher Co. (which I shall hereafter call "the company") sold and delivered to Albert J. Holland a thresh-

ing outfit, and in payment thereof took certain promissory notes from him. The contract of sale contained the following clause: "All moneys which may be at any time hereafter owing or accruing due to the above named purchaser for work done by—or by the agent of—the purchaser, either wholly or partly, by the aid of the above described machinery, or any part thereof, shall, to the extent of all the above-mentioned notes then overdue, and to the extent of all notes accruing due within six months thereafter, and to all unpaid purchase money for which no notes are given, belonging to, be and are hereby assigned by the purchaser to the company, who shall apply the proceeds actually received by them, less the cost of collection, upon the said notes and purchase money." Holland did work with this machine, among others, for the applicant A. B. Miller, for whom he did threshing to the extent of $191.15. This work was done about the last part of October or first part of November, 1907. At the time that this work was done some of the notes given for the machine were overdue and unpaid to the extent of $1,900. On 2nd November, 1907, Holland assigned this debt due from Miller to the claimant Webster by writing as follows:—

"Nov. 2, 1907.

"A. B. Miller. Please pay to M. C. Webster the sum of one hundred and ninety-one dollars and 15 cents for $191.15 threshing in full done by

"A. J. Holland."

On 2nd November, immediately after the assignment to Webster was made, he (Webster) took it to Miller, shewed it to him, and notified him that the moneys had been assigned to him, and Miller thereupon agreed to hold the amount of this claim to Webster's order and to pay it to him. The notification in question was not in writing, however. On 14th November or thereabouts the company served a written notice on Miller as follows:—

"2810.

"To A. B. Miller

"Take notice that any sum or sums of money, debt or debts now due or to become due by you to Albert J. Holland, Riverview, Sask., for threshing done by him for you or on your behalf, have been assigned by the said Albert J. Holland to us. You will therefore pay over said debt or

debts, sum or sums of money, to us, American-Abell Engine and Thresher Co. Ltd., or our order.

"Dated this 14th day of November, A.D. 1907.

"American-Abell Engine and Thresher Co. (Ltd.),

"per Robert Stewart."

And on 24th December Messrs. Ross and Bigelow, on behalf of Webster, wrote to Miller notifying him that they were instructed to collect the amount of this claim for Webster, and informing him that, unless it was paid forthwith, proceedings would be taken against him. Miller thereupon interpleaded.

It was contended in the first instance that the assignment to Webster is not an assignment; it is merely a memorandum that the work was done by Holland; and that it was never signed in such a way as to indicate that the debt had been assigned; in other words, that it was a document which possibly purported on its face to be prepared for signature, but which never had been authenticated by a signature. I am of opinion that the document is a good assignment. No doubt, it is badly expressed and loosely prepared, but I think that it was sufficient for the purpose for which it was intended, and I have no doubt that it was intended for an assignment. In Caton v. Caton, 36 L. J. Ch. 886, the question arose what constituted a signature to a memorandum of agreement, and Lord Chelmsford, at p. 889, is reported as follows: "The cases upon this point cited in the course of the argument establish that the mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of 'authenticating the instrument,' or 'so as to govern the whole agreement,' to use the words of Sir William Grant in the case of Ogilvie v. Foljambe, or in the language of Mr. Justice Coleridge in Lobb v. Stanley, 'so as to govern what follows.'" This signature was put at the end of the document as signatures are usually placed, and it was written in a manner indicating that it was intened to be a signature; it was not placed in the body of the document, and, in my opinion, to use the words of Lord Chelmsford, it is inserted in such a manner as to govern the whole instrument, and has therefore the effect of authenticating it.

The next questions are: Is an assignment of future debts a good assignment under ch. 41 of the Consolidated Ordin-

ances? And, if it is, whose assignment has the preference? These questions are not so easily disposed of, in my opinion. There is a wide difference between the English statutory provision respecting assignments of choses in action and the provision in force in this province. The English provision is clause 6 of sec. 25 of the Judicature Act, 1873. That provision is that "any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt or chose in action," etc. It will be noticed that this provision requires the assignment to be absolute, and it must not purport to be by way of charge only, and notice in writing of the assignment must be given to the debtor in order to bring the assignment within the operation of the paragraph. The provision in force in this province is to be found in ch. 41 of the Revised Ordinances, and is as follows: "Every debt and any chose in action arising out of contract shall be assignable at law by any form of writing which shall contain apt words in that behalf, but subject to such conditions and restrictions in respect to the right of transfer as may appertain to the original debt," etc. It will be observed that this provision does not require the assignment to be absolute; it says nothing as to its being by way of charge, and it contains no provision as to notice. There are, however, sections providing for notice, as, for instance, sec. 4 provides that the assignment "shall be subject to any defence or set-off in respect of the whole or any part of such debt or chose in action arising out of contract existing at the time of the notice of assignment to the debtor or person sought to be made liable." Then sec. 5 provides that in case of any assignment made in 'conformity with the provisions of this chapter," and notice thereof given to the debtor or person liable in respect of the subject of such assignment, the assignee shall have, hold, and enjoy the same free of any claims, defences, or equities which may have arisen subsequent to such notice by any act of the assignor or otherwise." I will draw attention to the effect of these last mentioned provisions later on. At present I will deal with the question of whether the assignment of

future debts is valid under the Ordinance, because any claim that the company may have to this debt arises by virtue of the clause in their contract which I have cited, and that clause amounts to an assignment of future debts. I think that even under the English statutes it is very clear that future debts are assignable. In Brice v. Bannister, 3 Q. B. D. at p. 573, Coleridge, C.J., says, dealing with the English provision: "It is argued that, in order to satisfy the terms of the statute to which he has referred, the debt must be an existing debt, and an assignment of a debt to become due will not be within the terms of the section. Now, that a debt to become due is a chose in action, is clear; and that an assignment of a debt to become due would have been enforced in equity, upon the authorities, is clear." If a future debt is assignable under the provisions of the English Act, a fortiori it will be assignable under the provisions of the Ordinance. In England, however, there appears to be some question as to whether a part of a future debt can be assigned, and then as to whether an undefined portion of future debts can be assigned, and that question seems to turn upon the fact that the assignment must be absolute under the English provision, and because it could not be by way of charge. In Jones v. Humphreys, [1902] 1 K. B., Lord Alverstone, C.J., is reported at p. 13 as follows: "I think there is no doubt that an absolute assignment of future debts may be a good assignment for the purposes of the section; and I also think that an absolute assignment of a definite sum out of a future debt may possibly be within the section. But I think that an assignment of an undefined portion of future debts will not come within it. To satisfy the section you must be able to find in the document an intention to assign some definite sum, so that the debtor may know how much he is justified in paying to the assignee." Under the Ordinance I am of opinion that that is not necessary. All one has to do is to decide whether it is an assignable debt, and, if so, it would pass if apt words were used for the purpose. In this case I am of opinion that apt words have been used for the purpose.

Then the question arises, who is the proper assignee of the debt in question in this case? Undoubtedly, so far as priority of date is concerned, the company are the first in order, for their assignment was made on 6th April, 1905. But the contention is that Webster having first given notice and the claimant Miller having promised to pay him, the company are cut out. In my opinion, the promise of Miller

to pay does not affect the question, because the company cannot be cut out in that manner. Then, does the verbal notice given by Webster give him precedence? This question cannot be discussed in the light of the English decisions, because clearly in England notice to the debtor is necessary in order to give validity to the transfer, but I am of opinion that notice is not necessary under the Ordinance to give effect to the transfer. It is necessary under secs. 4 and 5 to be given to the debtor—not for the purposes of the transfer—but for the purpose of protecting the debtor with respect to any equities or other transactions which may in the meanwhile arise between him and his original creditor, and protecting the assignee against any equities which may subsequently arise between the debtor and such creditor, and that is all. Therefore, I am of opinion that the assignment to the company takes the preference. If, before Miller had received any notice of the assignment to the company, he had paid over the money to Webster, I have no doubt that the payment would have been good, but not having paid it, and the notice having come in from the persons who were really entitled to the debt, Miller would be bound to pay the party to whom the first assignment was made. I, therefore, give judgment for the company that they are the parties entitled to be paid the debt.

This was a case where I think Miller was thoroughly justified in interpleading, and I direct that Miller's costs be paid out of the fund in question, and that Webster pay the company their costs of this interpleader and also the amount so ordered to be paid to Miller out of the fund.

SASKATCHEWAN

PRENDERGAST, J. MARCH 31ST, 1908.

TRIAL.

SCHUCHARD v. DRINKLE.

Principal and Agent—Agent's Commission on Sale of Land —Contract—Sale Brought about by Efforts of Agent.

Action for commission on sale of land.

Ferguson, Saskatoon, for the plaintiff.

F. M. Brown, Saskatoon, for the defendants.

PRENDERGAST, J.:—The plaintiff is a farmer residing in the district of Saskatoon, who seems to have been in touch with a certain class of intending settlers coming from the United States, and the defendant is a real estate agent, who had a special agreement with the Canadian Northern Railway Company for the disposal of a large tract of their lands in the said district.

The plaintiff's claim is for commission on the sale of three pieces of land, all in township 34, range 7, west of the 3rd meridian, being $160 on the east half of section 35, a balance of $80 on the west half of the same section, and a balance of $40 on the north-east quarter of section 21.

The defendant denies indebtedness as to the first sum; while as to the second and third he alleges that they came due only a few days before the issue of the writ, and brings into Court $120.

The plaintiff says that on or about 8th November, 1905, he went to the office of the defendant, and that having inquired about said township 34, the latter told him the price was $8 per acre. He says he then asked if there would be a commission of 50 cents an acre for him on that price, to which the defendant replied that he would have to make the price $8.50 to include the commission. The plaintiff swears as follows: "I said, 'At $8.50 that will comprise my commission?' and he said, 'yes.'" This conversation is not denied by the defendant.

The plaintiff next took out two intending settlers from the States, Otto and Lewis Gratious, to view the said township, with the result that they picked out for themselves the south half of section 27, the north-east quarter of section 19, and the north-east quarter of section 21, and also the west half of section 35 as likely to meet the approval of another brother, Walter, who was to come up later.

The following day, the plaintiff took Otto and Lewis Gratious to the defendant's office, and they fully explained to him what land they had selected, and for whom. I am satisfied beyond any doubt that the price then agreed upon was the same as had been stated before to the plaintiff, that is to say, $8.50.

The defendant could not, however, conclude a sale without confirmation from the Canadian Northern Railway Company's head office at Winnipeg, and, as the Gratious boys had to leave at once for Regina on their way back to the States, they left with the defendant a deposit of $1 an

acre on the south half of section 27, the north-east quarter of section 19, and the north-east quarter of section 21. As to the west half of section 35, Walter Gratious, as already stated, was to come up and arrange for this himself.

The plaintiff swears that after Otto and Lewis Gratious had left, the defendant asked him "if they would stand a raise of 50 cents," and that upon his remonstrating to him, the latter added, "If you want to get a commission, you have to make it $9." On this point the defendant says, "I won't say that I did or did not raise the price after they left here."

The defendant at all events wired to Otto and Lewis Gratious at Regina that the Canadian Northern Railway Company had already sold the south half of section 27, but that the two other quarters were available, and that the price for these was $9. Otto and Lewis Gratious, upon hearing that the south half of section 27 was already sold, then decided to take instead the west half of section 35 which they had first reserved for Walter, and to drop one of the two other quarters (keeping only the north-east quarter of section 21), as they could not afford to buy more at the increased price of $9. They wrote at once to the defendant to that effect, and the cash payment was adjusted accordingly.

When Otto and Lewis Gratious were back home in the States, which was about the middle of November, they informed their brother Walter of what they had bought for themselves, and told him that the other half of section 35 (i.e., the east half) was yet available, whereupon he (Walter) wrote to the plaintiff asking him if this east half was as good as the west half, and, if so, to have it reserved for him. The plaintiff swears that he communicated this to the defendant, and that the latter then urged him to close the deal.

After further communications, Walter Gratious again writes to the plaintiff on 12th February, saying that he would be in Saskatoon on the 20th, and asking him to meet him and bring him out to see this half section. This was done on the day appointed, after which the plaintiff took Walter Gratious to the defendant's office and introduced them to each other, and the deal was then closed.

The defendant having brought into Court the sums claimed as balance of commission on the sales to Otto and Lewis Gratious, the dispute at the trial was really only with reference to the half section sold to Walter.

After Otto and Lewis Gratious reached their home, about 15th November, and at the same time that they had correspondence with the plaintiff, there was also an exchange of letters between Otto and the defendant, and one letter from Walter to the latter on 12th February; and it is upon these letters that the defendant bases his contention that he, himself, brought the sale about.

But these letters do not bear this out at all.

To begin with, this correspondence was started about 15th November by the defendant writing to Otto a letter (not produced) which seems to have simply referred to the state of matters as they had then just been brought about, and conveyed to his knowledge, by the plaintiff.

Then, in his letter of 15th December to Otto, the defendant shews that he had considered the sale of the said half section concluded ever since the receipt of his (Otto's) letter of 16th November. Now, what had the defendant done at that date to bring the deal about? And what was there at all, in the way of procuring Walter as a purchaser, that had not then been directly effected by the plaintiff?

It does not matter in my view of the case—and that is all that is left to the defendant to rely upon—that Otto, in two of his letters to the defendant, should have referred to the intending purchaser as "a friend" or "friends" instead of mentioning his brother Walter. Otto was evidently acting throughout for his brother, with the latter's consent, and, I may say, to the defendant's knowledge.

It was the plaintiff who first took Otto and Lewis Gratious to the defendant, after shewing them the land; it was upon the plaintiff that Walter relied throughout, and more particularly as to the value of the said west half as compared with the east half already secured by his brothers; it was the plaintiff again who took Walter out as he had done for the other two, and who finally introduced him to the defendant, at which interview the deal was closed.

I must hold, then, that it was the plaintiff's efforts that "brought about the negotiations which resulted in the agreement," and that was "the causa causans of the sale:" Wolfe v. Tait, 4 Man. L. R. 59; Boyle v. Grassick, 2 W. L. R. 284.

In fact, I do not see why the plaintiff did not also claim commission with respect to the north-east quarter of 19, for which he brought a purchaser for $8.50 as agreed upon.

which sale fell through only owing to the defendant raising the price to $9, after Otto and Lewis Gratious had made their deposit on the first understanding.

There will be judgment for the plaintiff for the full amount claimed, with costs.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

YATES v. RESER.

Principal and Agent—Agent's Commission on Sale of Land —Procuring Purchase Ready and Willing to Carry out the Purchase—Purchaser not Complying with Vendor's Condition as to Deposit with Bank — Deposit Actually Made but so as to be Withdrawable at Purchaser's Option —Refusal of Vendor to Complete—Agent not Entitled to Commission.

Appeal by defendant from judgment of NEWLANDS, J., in favour of plaintiff for the recovery of $400 commission on the sale of a half section of land by the plaintiff for the defendant.

The appeal was heard by WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.

W. B. Willoughby, Moose Jaw, for the defendant.

H. E. Armstrong, Moose Jaw, for the plaintiff.

LAMONT, J.:—The action was brought for commission. but at the hearing of the appeal counsel for the plaintiff applied to amend the statement of claim by adding thereto an alternative, as follows:—

"6. Alternatively the plaintiff's claim is for the sum of $400 for services rendered by the plaintiff as a real estate broker to the defendant at his request, whereby the plaintiff procured a purchaser qualified and willing to buy of the defendant the land mentioned in paragraph 2, substantially

upon the terms which the defendant intimated to the plaintiff as those upon which the defendant was willing to sell. The defendant agreed to pay the plaintiff the sum of $400 for such services, and the services so rendered by the plaintiff to the defendant were reasonably worth the sum of $400."

A similar amendment was allowed by the Supreme Court of the North-West Territories en banc in Boyle v. Grassick, 2 W. L. R. 284; and, for the reasons there stated by the Chief Justice of this Court, I think the amendment should be allowed.

The defendant appeals on two grounds:—

"1. That the Judge at the trial erred in finding that the plaintiff was not to sell the land, but only to get a purchaser.

"2. That the Judge at the trial erred in finding that the plaintiff found a purchaser ready and willing to complete the purchase, and that the sale fell through because the defendant would not complete the sale."

As to the first of the above grounds, it was urged by counsel for the defendant that, on a proper construction of the authority given by the defendant to the plaintiff, the plaintiff was instructed to sell the land, not merely to find a purchaser, and that, as no sale had been effected, the plaintiff was not entitled to recover. The authority given by the defendant to the plaintiff in the first instance was as follows:—

LISTING BLANK.

"Report on N. E. ¼ sec. 14, tp. 16, R. 14, west 3 meridian, containing.....160 acres. Acres under plough, 160 . Acres fit to crop next season, 160....Acres of meadow .....Acres of prairie.....Acres of tame grass.....Acres of timber.....Acres of waste land.....Acres stony or marshy.....Acres fenced. 300 rods hog fence.....Soil, clay loam. Subsoil, clay. Is surface flat or rolling? Flat .....Distance from Swift Current.....nearest railroad town, 4½ miles. From schoolhouse on land.....From church.....miles. Buildings, stone house 28 x 28, 2 storeys. Machine shed 26 x 36, hog house 24 x 24, cow shed 40 x 70, 2 wells, pumps and 1 windmill, lumber shack 10 x 14, 15,000 trees and fence bushes. Total value of buildings $.....Price $25 per acre cash down $12, balance to suit purchaser, with interest at 8 per cent.

"I hereby agree to place the above described land with W. M. Yates exclusively for sale for the next one month, commission to be 5 per cent. I hold by way of title (here state whether deed, C. P. R. agreement, etc.), clear title.

"If had under agreement state how much is still unpaid and how payable.....

"I further agree to give purchaser complete assignment of my right, title, and interest upon the payment or satisfactory securing of the price stated.

"July 18, 1908. E. W. RESER."

A similar authority was given for the other quarter-section. Under this authority the plaintiff sold the land to Walter Murray and Henry Hein, of Rock Falls, Illinois, and entered into a written agreement with them. This agreement contained certain terms not covered by the above written authority to the plaintiff, and the defendant, on the agreement being presented to him, refused to carry it out. The plaintiff then asked him on what terms he would sell, and to put it in writing, and the defendant gave to the plaintiff the following:—

"The following are the terms upon which I agree to sell my farm, i.e., N. E. ¼ of 14-16-14 and N. W. ¼ of sec. 13-16-14, together with all buildings as they stand at present and one half share or all my share of all crops now on said premises. Terms $4,000 to be deposited with the Union Bank at Swift Current on or before 22nd August, 1906, pending arrival of clear title. Balance to be paid to suit purchaser at 8 per cent. interest or cash on arrival of title without interest if desired.

"Purchasers agree to pay any expenses incurred in building granary for said half share of crop and also half share of all harvesting operations and expenses. Possession to be given at opening up of spring, 1907.

"Commission to W. M. Yates to be 5 per cent. of purchase price.

"E. W. RESER."

It was contended for the defendant that these two documents must be read together, and that the placing of the land in the hands of the plaintiff "exclusively for sale" means more than finding a purchaser; that it is "an authority to the agent to sell" and to make a valid and binding sale enforceable at law.

In my opinion, this contention cannot be maintained. The listing of lands with an agent "exclusively for sale" does not give to the agent any wider or different authority than the mere listing of lands "for sale." The giving to an agent the exclusive right of sale prevents the vendor from listing the land with other agents also, which he would have the right to do if the exclusive right was not given. But, in my opinion, it does not add, in the slightest degree, to the authority which an agent would have if the lands were listed with him for sale, but not exclusively.

In Gilmour v. Simon, 1 W. L. R. 417, the agent had by verbal agreement the exclusive right to sell the defendant's lands until the following Monday, 7th December. On 5th December he made a sale to Gilmour, and signed as agent of the vendor a receipt embodying the terms of sale. On the vendor refusing to carry out the sale, the purchaser brought an action to compel specific performance of the agreement. The agent was not given special or express instructions to sell the land and enter into a binding contract. The Court held that what took place in that case was merely "the ordinary case of an owner putting his property in the hands of an agent to negotiate a sale for him. The agent in such case is only authorized to find a purchaser who would accept the vendor's terms, and bring him to the owner. He has o authority to sign a binding agreement in the owner's name."

In Boyle v. Grassick the plaintiffs were employed by the defendants to sell certain lands in the city of Regina. The price of the land was to be $9,500, payable $5,000 cash and the balance in 3 equal annual instalments, with interest at 7 per cent. The Court held that under the circumstances of this case all the agents were to do was to find a purchaser, and the Chief Justice of this Court, in giving the judgment of the Court, used the following language: "The term 'sell' is a term that would ordinarily be used when a person lists property with a broker to find a purchaser, and, unless there was something to indicate that there was an intention to give authority to sell, it would be inferred that the intention merely was to authorize the broker to find a purchaser."

The case relied upon by the defendant as shewing that the agent must sell and make the contract enforceable in law before being entitled to his commission was the case of Rosenbaum v. Belson, [1900] 2 Ch. 267. In that case, however, the authority was as follows: "Please sell for me my houses, and I agree to pay you a commission on the purchase price

accepted;" and the Court held that these words constituted an express authorization to sell the land and make a binding contract. There is, to my mind, a wide difference between the language of the authority given to the agent in that case and the present one. In that case the authority was, "Please sell for me my houses," while in the present case the authority given to the agent is simply, "The following are the terms on which I agree to sell my farm," etc. This was the authority under which the farm was sold, but, even if we read along with this the first authority given, as it was contended by counsel for the defendant we should do, it does not, in my opinion, bring the case within the authority of Rosenbaum v. Belson. The first authority, after describing the lands listed, was as follows: "I hereby agree to place the above described lands with W. M. Yates exclusively for sale for one month, commission to be 5 per cent." There is entirely absent from this case the direction to sell contained in the instructions given in Rosenbaum v. Belson. All that was done in this case was to list the land with an agent for sale in the ordinary way, and the duty of the agent, in my opinion, was simply to find a purchaser able and willing to purchase on the terms specified.

The next question is: did the plaintiff find a purchaser who was willing to purchase on the terms stipulated for by the defendant? On receiving the first authority, the plaintiff sold the land to Murray and Hein, and he entered into a written agreement with them which the defendant refused to carry out because it embodied terms beyond what he had authorized. The plaintiff then got from the defendant in writing the terms upon which he would sell, and communicated these to the purchasers, and asked them if they would buy on these terms. They wired to him on 20th August as follows: "Change contracts to conform to Reser's demands, and have him sign them. Have wired $4,000 to Union Bank to-day." The only ground upon which it is contended that the purchasers did not comply with the terms stipulated for by the defendant, is, that, although they had deposited $4,000 in the Union Bank before 22nd August, it was deposited in their own names, and they could at any time have withdrawn the same, and that therefore it was not a deposit within the meaning of the defendant's agreement. It was admitted that the money was not to be deposited in the defendant's name, but it was contended that it could not be considered as deposited until the bank had instructions to pay it to the de-

dendant on his producing a clear title, and that this was not done until after 22nd August. The evidence shews that the purchasers interpreted the agreement as meaning simply that they should deposit $4,000 in the Union Bank at Swift Current, which they did on 20th August. On 22nd August the defendant attended at the bank, and was informed that the $4,000 had been wired to the bank in the name of Murray and Hein, the purchasers, but that it was not to his credit, nor was his name mentioned in connection with it. On the same day he wrote to the plaintiff notifying him that the deal was "off." On 22nd August the plaintiff's firm, ascertaining that the defendant was objecting to the deposit being in the purchasers' name, wired Mr. Hein as follows: "Money should be deposited to your credit, to be withdrawn by Reser on production of clear title. Instruct bank promptly." The purchaser, in reply, wired to the manager of the Union Bank at Swift Current: "Reser may withdraw money on production of clear title, but title must be clear." This did not reach the bank until 24th August. The question now is, "Was the deposit of the money in the Union Bank a sufficient compliance with the agreement of the defendant to entitle the plaintiff to his commission?" The principle of law governing cases of this kind is laid down in Dart's Vendors and Purchasers, 7th ed., p. 214, as follows: "An agent will be entitled to commission or to an equivalent amount in the form of a quantum meruit or damages where as a result of his action a person qualified to be a purchaser becomes willing or can be compelled to buy substantially upon the terms which the proprietor has expressly or impliedly intimated to the agent as those upon which he is able and willing to sell." And in McKenzie v. Champion, 12 S. C. R. 649, Ritchie, C.J., laid down the same principle in these words: "Was the plaintiff merely to find a purchaser willing to purchase.? If so, did he fulfil his contract, and was the purchaser ready and willing to complete his purchase, and did the sale fall through because the defendant could not or would not complete the sale by reason of want of title or otherwise? If so, the plaintiff would be entitled to his commission because he substantially performed what he undertook to do."

The trial Judge found as a fact that the plaintiff did procure a purchaser both able and willing to complete the sale, and that the sale fell through because the defendant would

not complete. And a perusal of the evidence satisfies me that the finding was justified. With great deference to those who hold the contrary view, I must say that the fact that the money was deposited in the names of the purchasers does not appeal to my mind as one of vital importance when considered in the light of the other facts, that the purchasers had instructed the plaintiff to change the contract to comply with Reser's demand, that they believed when depositing the money that they were fully complying with his demands, and that, immediately on being notified that he expected the bank to have instructions to pay it over to him on production of a clear title, the necessary instructions were wired to the bank. The plaintiff, in my opinion, has substantially performed all that he undertook to do. He procured a purchaser able and willing, even anxious to complete, and should be remunerated for his services in the amount awarded by the trial Judge.

The appeal, in my opinion, should be dismissed with costs.

JOHNSTONE, J.:—There can be no question in this case as to the contractual relationship between the plaintiff and the defendant. It was that the plaintiff should procure a purchaser for the defendant of the lands in the statement of claim mentioned. Was this done by him and did the plaintiff procure a purchaser ready and willing to purchase on the terms stated by the plaintiff? I think this question must be answered in the affirmative.

In the memorandum containing the terms upon which the lands would be sold by the defendant occur these words: "Terms $4,000 to be deposited with the Union Bank at Swift Current on or before 22nd August, 1906, pending arrival of clear title."

The plaintiff procured "a purchaser" in the persons of Murray and Hein, purchasers ready, willing, and anxious to purchase, and by whom $4,000 had been deposited in the Union Bank at Swift Current by wire before the 22nd August for the purpose of complying with the terms of the defendant's offer. A contract had theretofore been signed by the proposed purchasers, which had become inoperative by reason of a change made in the terms of sale by the vendor before signature by him, which, if signed by him, would have constituted a good and binding agreement between the parties.

The readiness to buy by Murray and Hein is evidenced by their telegram of 20th August to the plaintiff in these words: "Change contracts to conform to Reser's demands

and have him sign them. Have wired $4,000 to Union Bank to-day."

These contracts were properly prepared accordingly and presented to the defendant for signature, and he and the solicitor by whom the contract referred to was drawn went to the bank together to make inquiries as to the moneys, and because the $4,000 had not been deposited to the credit of the defendant, instead of the purchasers, he, the defendant, refused to sign the agreement and to carry out the sale already effected by the plaintiff. He states so positively in his letter of 22nd August to the plaintiff.

I do not think the defendant's action in refusing to sign the contract and to carry out the sale, for the reason stated, was a reasonable one, in the circumstances. Had he signed and performed that part of the contract which rested with him on the terms proposed by him, doubtless the sale would have been completed in accordance with such terms and the money forthcoming. No person of common sense would have deposited $4,000 to the credit of the defendant in the bank for various reasons, and he could not expect to so find it or that it should be paid over to him until at least a binding contract had been entered into, and the defendant's terms did not require that it should be so deposited. It was solely owing to the default of the defendant that the sale fell through, and I therefore think the plaintiff entitled to his commission for the stipulated amount and that the judgment of my brother Newlands is right.

WETMORE, C.J.:—I agree with the judgment of my brother Lamont in his conclusion that the property in question was listed by the plaintiff with the appellant merely to procure a purchaser and not to effect a sale. I cannot distinguish this case in that respect from Boyle v. Grassick.

But I have very reluctantly come to the conclusion that I cannot agree with him in respect to the effect of the money being paid into the bank in the manner it was. The provision of one of the documents authorizing the plaintiff to procure a purchase for the land was that $4,000 was to be deposited with the Union Bank at Swift Current on or before 22nd August, 1906, pending arrival of clear title. That sum was paid into that bank on 22nd August, but it was deposited in the name and to the account of Murray and Hein, the proposed purchasers. The question arises, what was the meaning of the provision that the money should be paid in

"pending arrival of clear title?" It seems to me that it must mean that it was to be paid into the bank in some way which would, either by the manner of its being paid in or in some way, ensure that it would remain there until the proposed vendor, Reser, would within a reasonable time be able to produce a clear title. It seems to me that it could not mean that it was to be paid in such a way that the proposed purchasers could withdraw it the next day or any day at all. It was to be paid in as a guaranty that the proposed purchasers would carry out their contract of purchase, and therefore warrant the vendor to set about to get possession of and produce a clear title to the land, otherwise it would serve no practical purpose. The money was not paid in in such a way, and, in my opinion, the defendant had a right to withdraw from the transaction, his instructions to the plaintiff not having been complied with; consequently, I am of opinion that the judgment of the trial Judge should be set aside and judgment be entered for the defendant with costs. The plaintiff to pay the costs of this appeal.

PRENDERGAST, J.:—I have to dissent from the judgment of my learned brother Lamont.

I do so upon the ground that the provision for a deposit in the defendant's written conditions of sale was not, in my opinion, complied with by the purchasers.

This provision reads as follows: "$4,000 to be deposited with the Union Bank at Swift Current on or before 22nd August, 1906, pending arrival of clear title."

It is important to note that the words used here are not "in the Union Bank," but "with the Union Bank." Nor is it stated that the money is to be deposited either in the purchasers' or in the vendor's name.

It would, of course, have been unreasonable for the defendant to expect that the money should be deposited in his name, as he could then have appropriated it before the purchasers had received anything in return. But I consider it also unreasonable to say that the condition was complied with by the money being simply deposited in the name of the purchasers, as they also could have drawn it out the next moment, and thus make the procuring futile and purposeless. The very fact that this was made a condition by the vendor, shews that he intended that it should be in the nature of a security, and that he should have thereon, during the time he reserved to himself to perfect title and make arrangements to

pay off incumbrances, such a lien as would, at least, prevent the purchasers from taking it back at their fancy.

There is a very simple and well-known method of safeguarding the rights of all parties in cases such as this. It consists in the purchasers placing the money, not to any one's credit in the bank, but with the bank (as the condition here reads) with instructions that it be paid over to the vendor, if, within so many days, he produces a proper transfer of the land to the depositor.

This is a prevalent practice. I am satisfied that this, or something of like effect, is really what was intended by the defendant, and the plaintiff, who is a real estate agent of experience, must or should have understood it so.

The deposit of $4,000 by the purchasers in their own name was then not a compliance with the condition, and, in my opinion, the appeal should be allowed with costs.

[The Court being divided, the judgment of NEWLANDS, J., was in effect affirmed.]

SASKATCHEWAN

MARCH 31ST, 1908.

FULL COURT.

REX v. DUNNING.

Criminal Law—Rape—Evidence of Penetration—Sufficiency—Evidence of Complaints made by Prosecutrix—Answers to Leading Questions—Inadmissibility—New Trial.

Case reserved by JOHNSTONE, J., upon an indictment and conviction of the prisoner for rape.

N. Mackenzie, K.C., for the prisoner.

F. Ford, K.C., for the Crown.

The judgment of the COURT (WETMORE, C.J., PRENDERGAST, NEWLANDS, and LAMONT, J.J.), was delivered by

NEWLANDS, J.:—The case is stated as follows:—

During the trial and at the close of the case for the Crown objection was taken on behalf of the prisoner by his counsel that no case had been made out, on two grounds:—

"1. That the evidence did not disclose that any offence amounting to rape had been committed by the accused.

"2. That the evidence of complaints made by Jennie Coles to her husband and Mustard was inadmissible, as the same was solely the result of questions asked her by Mustard and Coles respectively.

"From the manner in which this witness gave her evidence, I treated these complaints as evidence corroborative of the evidence of Jennie Coles shewing want of consent on her part, and ruled against the contention of the counsel as to both objections.

The questions submitted are:—

"1. Was there evidence of penetration sufficient to warrant conviction?

"2. Was the evidence received of complaints made by Jennie Coles admissible?"

The prosecutrix gives evidence of what took place and says that the prisoner held her down and entered her. In answer to questions on cross-examination she said that he had connection with her, and that he had raped her, and she stated that she knew what rape meant. I think on this evidence there was sufficient evidence of penetration for the learned Judge to leave the case to the jury.

Was the evidence received of complaints made by Jennie Coles admissible? It was objected by Mr. Mackenzie that these complaints were made in answer to questions.

In Rex v. Osborne, 18 Cox C. C. 311, Ridley, J., in delivering the judgment of the Court, said, at p. 314. "It appears to us that the mere fact that the statement is made in answer to a question is such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect and will render it inadmissible; but a question such as this, put by the mother or other person, 'what is the matter?' or 'why are you crying?' will not do so. These are natural questions which a person in charge will be likely to put. On the other hand, if she asked, 'did so-and-so (naming the prisoner) assault you?' 'Did he do this and that to you?' then the result would be different, and the statement ought to be rejected."

From the evidence it appears that the first complaint made to Mustard was in reply to a question. Mustard in his evidence says, "I asked if Jim Dunning had been up, and I asked had he been getting too free with her." These

questions are of such a leading character that any complaints made in answer to them would not be admissible and should have been rejected. After the answers to these questions Mustard went for the prosecutrix's husband, and when he returned with him he (the husband) says in his evidence: "I met her outside the shack and threw my arms around her neck and kissed her and then took her into the shack. I asked her if Dunning had hurt her," and in answer to this question she made the complaint. This question was also a leading one, and the answer to it was inadmissible and should have been rejected.

The first question should be answered Yes, and the second question No.

There should, therefore, be a new trial.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

BANNERMAN v. BARLOW.

Sale of Goods—Specific Article—Sale by Description—Reliance on Vendor's Representations—Proof of Falsity—Implied Warranty—Action for Price—Evidence—Credibility of Witnesses.

Appeal by plaintiff from judgment of JOHNSTONE, J., dismissing the action, which was brought to recover the amount due upon 3 lien notes given for the price of an engine and separator sold by plaintiff to defendant.

The appeal was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, and LAMONT, JJ.

C. P. Fullerton, Winnipeg, for plaintiff.

F. W. G. Haultain, K.C., for defendant.

WETMORE, C.J.:—This was an action brought to recover the amount due upon three lien notes so called, respectively payable on 1st November, 1906, 1907, and 1908. The notes contained an accelerating clause. These notes were given in

payment for an engine, separator, tank, and pump, at the time the notes were given lying at Poplar Point, in the province of Manitoba, sold by the plaintiff to the defendant. This machinery was to be shipped at Poplar Point to the defendant at Frobisher, in this province. The agreement for the sale of the machinery was made on 15th December, 1905; on 19th May, 1906, the defendant wrote the plaintiff at Winnipeg the following letter: "Owing to circumstances which I cannot here explain to you, I wish to cancel my order for second hand threshing outfit. Please cancel this order, as I will not now accept same under any consideration. I am sorry if this has inconvenienced you in any way." On 18th June the plaintiff wrote the defendant as follows: "Your communication of May has been received, and, in reply, beg to state that it is immaterial to me whether you have threshing machine shipped, or leave it where it is, as you no doubt are aware that the machine is yours, and has been settled for by you; so at proper time you will be expected to pay for it, or forfeit the security given me by you. Trusting this will fully explain my position in the matter, I remain, yours truly." On 23rd June the defendant wrote the plaintiff: "Received your notice about the outfit. You told me I could cancel it if I could not see my way clear. I will be in a bad shape if I take it. There are two threshing outfits came in near me; they are Americans, and there are a company outfit of my near neighbours getting one, and I have only myself to thresh. I possibly could not pay for it; I only have 120 acres in myself. Please look into it yourself. I have always done right with you; you see, I could have done you out of little when you was dealing in this town, as I believe in honesty. Take in consideration how you would feel yourself if you was in the same shape as I am. Please write and let me know what the best you will do; it has been troubling me ever since I gave the order." On 19th August the defendant wrote the following letter to the plaintiff: "Received your notice about outfit; if you ship it, you will ship it at your own risk, as I will not receive it on any account." And in reply to it the plaintiff wrote the following: "Replying to yours of August 19th, beg to refer you to my previous letters, every word of which will be fully carried out. My contract with you has been fulfilled to the fullest extent; and you will herewith find enclosed shipping bill for threshing outfit, which was shipped August 21st. You must un-

derstand that the machine is yours, and if you do not use it to the best advantage you will doubtless be the loser; as I have fully protected myself in this matter; and still further, I shall not, under any circumstances, do any more than I have already done, by filling my agreement with you. I trust you will see the foolishness of your position in the matter; and feel that you must appreciate the fair manner in which I have dealt with you." About the 25th August the machinery arrived at Frobisher, where the defendant saw it. He never took actual possession of it and never gave any reason for not doing so, so far as I can discover in the testimony. The only notice of refusal to receive it was contained in his letter of 19th August hereinbefore set out, and that was sent before the machinery was shipped.

The defences were:—

(1) That at the time of the making of the agreement for the sale of this machinery the plaintiff represented to the defendant that such machinery was in good complete working and running order, and was as good as new, had only been used 120 days, and was fit for the purpose of threshing grain; and that it did not come up to these representations, and that the defendant therefore did not accept it.

(2) That the plaintiff was to pay the freight on the machinery from Poplar Point to Frobisher, and the defendant was to repay him out of the proceeds of the threshing.

(3) That at the time of the agreement it was agreed that the defendant should be at liberty to cancel the agreement, if he desired to do so.

The defendant also gave a mortgage upon his real estate to secure these notes, and he has counterclaimed asking for a decree setting aside the mortgage, and declaring the same null and void and of no effect, and directing the discharge of such mortgage from the records of the land titles office.

This action came on to be tried before my brother Johnstone at Oxbow in June last. The learned Judge found that the representations with respect to the machinery were made by the plaintiff and induced the sale; that the defendant had never inspected the machinery before purchasing, and had no means for doing so (without of course travelling all the way to Poplar Point). He held that this was a sale by description, and that, the goods not coming up to the description, the defendant had a right to refuse to accept them, and never did accept them, and therefore gave judg-

ment for the defendant on the claim and also on the counterclaim, and directed that the notes and mortgages in the pleading mentioned should be delivered up to be cancelled and the registration of the mortgage in the land titles office vacated.

The evidence with respect to the facts so found by the trial Judge was of a most contradictory character, and, as he had an opportunity of witnessing the demeanour of the witnesses and of forming an opinion therefrom, this Court ought not to interfere with his finding. I also agree that, having found as he did, there was a sale by description. I think, in so far as that question is concerned, the case comes directly within what was laid down in Varley v. Whepp, [1900] 1 Q. B. 513. It has been urged that this case goes further than any other case in this direction, and possibly it does but, in my opinion, it has not gone too far, and I am prepared to accept it as good law so far as the question of sale by description is concerned. But the difficulty I experience is that no notice was ever given by the defendant that he refused to receive, or that he rejected the goods on the ground that they did not answer the description of those he agreed to purchase. Varley v. Whepp, however, if well decided in that respect, decides that question also. Sections 33 and 34 of the Sale of Goods Ordinance (Con. Ord. ch. 39) provide as follows: "33. Where goods are delivered to the buyer which he had not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." "34. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." These sections are identical with secs. 34 and 35 of the Imperial Sale of Goods Act. The facts of this case are almost identical with those in Varley v. Whepp. The article in question there was an agricultural implement. Representations were made with respect to the quality of the machine; it was to be shipped by railway to a place called Beverly from a point distant from Beverly—I presume from Huddersfield. The machine did not answer the description; the buyer

gave a notice after its arrival, but it was not clear that this notice amounted to a notice of rejection. The Court held, as I have already stated, that the sale was a sale by description, and that the plaintiff had a right to refuse to accept it. The Court could not have held that a notice of rejection was necessary, because the Court distinctly held that it was doubtful whether the letter which I have referred to amounted to a notice of rejection, and, if a notice had been necessary, the Court would have had to decide whether or not the letter did amount to a rejection. Without holding that, they simply held that the buyer was not liable because he did not accept the article. At p. 517 of the report Channell, J., is reported as follows: "I am doubtful whether the letter of 2nd July could be treated as amounting to a rejection, but the purchaser certainly did not accept the machine by that letter, and therefore the property never had passed;" and the Court held that therefore the plaintiff had no right of action.

It would seem, therefore, that, whatever might have been the law in England, prior to the passing of the Sale of Goods Act, respecting giving notice of rejection, if the goods are forwarded under circumstances similar to those under which the goods were forwarded in this case, it is not now necessary to give such notice if the sale is by description, and the goods shipped do not answer the description. Section 33 of the Ordinance, which I have referred to, gives the buyer a reasonable opportunity of examining the property. Section 34 prescribes when the buyer is deemed to have accepted the goods and so completed the contract. Neither one of those events has transpired here. The defendant never intimated to the seller that he had received the goods; they were never delivered to the buyer at all, unless the shipping the machinery at Poplar Point could be considered a delivery to the defendant; but, according to what was laid down in Varley v. Whepp, the shipping at Poplar Point did not make the property pass. Channell, J., at p. 517, states: "Then when did the property pass? Not when the machine was put on the railway, for the vendor could not make the property pass by putting on the railway that which did not fulfil the implied condition. The earliest date, therefore, at which the property could be said to pass would be when the machine was accepted by the purchaser. But it never was accepted."

It seems to me that this case is on all fours with Varley v. Whepp, and I agree with the learned trial Judge. This appeal should be dismissed with costs and the judgment of the trial Judge affirmed both with respect to the claim and counterclaim.

NEWLANDS, J., concurred.

PRENDERGAST, J.:—On or about 15th December, 1905, at Frobisher, in this province, the plaintiff agreed to deliver to the defendant a second-hand John Abell engine and Toronto Advance separator, tank and pump, which were then at Poplar Point in the province of Manitoba, for $1,250, and the defendant secured the said sum to the plaintiff by 3 lien notes, containing the usual acceleration clause empowering the vendor, should he consider the said notes insecure, to declare them due and payable at any time.

With respect to the delivery of the machinery, the plaintiff alleges that it was to be effected by "loading the same on board a railway car of the Canadian Pacific Railway Company at Poplar Point aforesaid, consigned to the defendant at Frobisher station, in the province of Saskatchewan," while the defendant's contention is that the delivery was to be at Frobisher. The defendant admits, however, that he was ultimately to pay the freight, but says that the plaintiff was to advance the money at the time of shipping, and that he (the defendant) was to reimburse him for the same out of the proceeds of the next crop.

The main grounds of contention, however, are the two following, raised in the defence: first, that it was part of the agreement that the defendant should have the privilege of cancelling the same by notice at any time prior to the shipping; and, second, that the plaintiff represented to the defendant that the engine and separator were in good, complete working and running order, as good as new, had only been used 120 days, and were fit for the purpose of threshing grain, for which the plaintiff knew the defendant was purchasing them.

I will at once dispose of what remains of the more material undisputed facts, by saying that, prior to the shipping, the defendant wrote a number of letters to the plaintiff advising him that he desired to cancel the agreement, and that the goods having been shipped later on, the defendant

inspected them at Frobisher, but did not take possession of them, and in no way communicated further with the plaintiff on the matter.

On giving judgment for the defendant, the learned trial Judge does not seem to have deemed it necessary to make any finding of fact on the defendant's contention that he had the privilege of cancelling the agreement up to the time of shipping, nor to consider the question of delivery, so far as it may be affected by the place (either Poplar Point or Frobisher, whichever of the two it may have been), agreed upon for the same, and by the defendant having omitted to notify the plaintiff of his rejection of the goods.

The learned Judge presumably considered it sufficient for the determination of the issue that he should find, first, that the plaintiff did make the alleged representations with respect to the condition of the machinery, and second, that the said representations were not true in fact.

This Court will not disturb these two findings. It is not necessary that I should find that the weight of evidence fully justified such findings; it is enough that there is some evidence to support them; and, the trial Judge having had the opportunity of estimating the credibility of the witnesses, this Court will refrain from reviewing them, on the principles laid down in Knight v. Hanson, 3 W. L. R. 412, and Village of Granby v. Menard, 31 S. C. R. 14.

Now we have the following question, "Do the said representations constitute a condition the breach of which entitles the purchaser to treat the contract as repudiated, or are they a guarantee merely entitling him to damages?"

In the circumstances of this case the defendant, in order to treat such representations as a condition, must bring the agreement under sec. 15 of the Sales of Goods Act, which says that, "when there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description."

Was this, then, a contract for the sale of goods by description?

At common law, there is a distinction between a sale by description of unascertained or future goods, and a sale by description of a specific chattel. In the first case, the description is always a condition, while in the latter, it does not imply a condition unless it is "essential to the identity of the chattel, so that its falsity makes the chattel

something quite different from what was contracted for:" Benjamin on Sales, 5th ed., pp. 316, 607.

Our Sales of Goods Act now provides generally that a condition that the goods shall correspond with the description given, shall be implied in all cases where there is a contract for the sale of goods by description. But it does not define what constitutes a description; so that, with regard to specific goods, the common law distinction seems still to exist between statements which are essential to the identity of the chattel and such as are only collateral warranties or mere representations. It is all a matter of the intention of the parties in the circumstances of each case.

In Varley v. Whepp, 69 L. J. Q. B. 33, the plaintiff contracted with the defendant to sell to him a self-binder reaping machine, which was at another place then named, and which he described as having been used one season and having cut only about 50 to 60 acres. The defendant had never seen the machine. As a fact, the statement that the machine had cut only 50 to 60 acres was untrue. It was there held under the Sales of Goods Act that the description given was not a mere collateral warranty, but an identification of the machine; that, as the defendant had not seen the machine, he relied upon the description; and that the sale was, therefore, by description, and the defendant was not liable. And Channell, J., referring to sec. 13 of the English statute, which corresponds to sec. 15 of our own Act, said: "I think it applies to all cases where the purchaser has not seen the article sold, and relies on the description given to him by the vendor."

With reference to this case, Benjamin (p. 611) remarks that it shews that a less rigid interpretation may be put upon the term "description," as applicable to specified goods under the Code, than would have been placed on it at common law.

In the present case, the purchaser had not seen the goods. They consisted in second-hand machinery, which—if only described in these words—might be worth as much as new for all practical purposes, or might be worth next to nothing. One cannot suppose that the intention of the purchaser, who was paying $1,250 for it, was simply directed towards acquiring second-hand machinery in whatever condition it might be. On the contrary, we must assume that without the plaintiff's representation that the machinery was in good running and working order, etc., the defendant

would not have entered into the contract. This case comes, then, within the rule laid down by Channell, J., above referred to, and I must hold that the representations formed part of the description, and, as such, were a condition and not a mere warranty.

There are, however, 3 more points to be considered: first, whether it was part of the agreement that the defendant could cancel it at any time before shipping; second, whether it was agreed that the plaintiff should prepay the freight; and third, whether the defendant was bound to reject the machinery after it reached Frobisher.

In view of the conclusion I have reached with respect to the condition of the machinery, the two first questions are immaterial in themselves, but might have a bearing on the third.

As to the right to cancel before shipping, I find that it was not reserved under the agreement. I think that the defendant's letter of 19th May to the plaintiff shews that. If the right had been reserved, the defendant would have so stated it in his letter, and he would have made it the expressed ground for his intention to cancel, which he did not. That he should have done so only in his second letter seems to mark the statement as the result of an afterthought. He parted with the notes at the time, and the bargain, which was completed, so far as it could then be completed, must stand, unless he conclusively shews the right of cancellation which he claims.

Now, was the plaintiff to prepay the freight? After some hesitation, I have come to the conclusion that such was the agreement. The circumstances of the conversation, as detailed by the defendant, seem to be plausible; and I, moreover, think it more likely that the defendant, both because he was then in a straitened condition financially, and from other motives of prudence, would not be ready to make an outlay of money on goods that he had not yet seen.

As to the third question, with respect to the defendant's duty to reject the goods and notify the plaintiff, it seems to me, leaving aside the question of prepayment of freight by the plaintiff, that it is altogether immaterial whether the delivery was to be at Poplar Point or Frobisher. As a general proposition the delivery would have taken place from the moment that the goods were put on board the cars at Poplar Point; or under the special stipulation alleged by the defendant the delivery would have been at Frobisher.

In either case, when the goods arrived at Frobisher, delivery would have been effected, whether it dated back from Poplar Point or not. But it is unnecessary to inquire into the defendant's duty from that standpoint.

I have held that the plaintiff was to prepay the freight. In that case there was no delivery, for the reason that, by omitting to pay the freight, the plaintiff did not put the defendant in a position to take delivery. Whatever construction of delivery might otherwise attach to the fact of the goods having been committed to the carrier for the defendant, is rebutted by the fact that they were so committed conditionally, and that the condition precluded the defendant from taking possession of the goods, not, at all events, without doing something that he was in no way bound to do —that is, pay the freight.

"The transfer of bills of lading is not a sufficient delivery to the seller, if the goods they represent are subject to liens or charges in favour of the bailors." Until the bailee "acknowledges to the buyer that he holds the goods in his behalf"—which must mean that he holds them absolutely so and not conditioned on the payment of any charge—"there is no delivery to the seller: Benjamin on Sales, 5th ed., p. 742.

If there had been delivery, the defendant would have been bound to notify the plaintiff. But there was no delivery, and the goods not being in his hands either constructively or otherwise, he was not bound to do so.

I think the judgment of the learned trial Judge should be maintained and the appeal dismissed with costs.

LAMONT, J., concurred in the result.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

BIRD v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Person at Railway Crossing—Crossing not at Highway and not Sanctioned by Board of Railway Commissioners—Non-compliance with secs. 242 and 243 of Railway Act—Fences at Crossing—Invitation to Public —Condition of Crossing—Danger—Common Law Negligence.

Appeal by plaintiff from judgment of NEWLANDS, J., 6 W. L. R. 393, dismissing the action without costs.

The appeal was heard by WETMORE, C.J., PRENDERGAST and JOHNSTONE, JJ.

Frank Ford, K.C., and R. A. Carman, Regina, for the plaintiff.

J. A. Allan, Regina, for the defendants.

JOHNSTONE, J.:—This is an appeal by the plaintiff from the judgment of Newlands, J., in the Court below, in favour of the defendants.

The defendants in the summer of 1905 constructed on their own lands a railway crossing with approaches extending from Railway avenue on the south 150 feet or thereabouts to the track and some distance north of the track. The government road allowance running north and south across the line of railway is something like 400 yards east of the crossing referred to. This highway seems never to have been in use as a crossing, but the public for years passed over on the defendants' lands at a point where the station now stands. The defendants, some years prior to 1905, having located their yard at the point of intersection of the railway line and the highway, rendered the crossing there dangerous and impassable owing to the number of tracks placed across the highway. In the summer of 1905 the defendants, requiring the lands over which the crossing then in use by the public was, for station purposes, constructed the crossing complained of, and erected thereon the usual sign "Railway Crossing," and this crossing has been in actual use, and is the only one which could since be used by the public with any degree of safety.

The plaintiff, who resides north of McLean some 5 miles, had occasion to go to McLean on 19th February, 1906, and in so doing crossed the track in the usual way, returning home about 6 o'clock in the evening. Her team attached to bob-sleighs, having thereon a waggon box in which the plaintiff sat, was being driven by her son on and along the crossing from south to north, and, when within about 12 yards of the track, one of the horses shied towards the east side of the approach, the checking of the horses by the driver causing the sleighs to swerve around and to go over the embankment, when the sleighs turned over upon the plaintiff, and she became injured to such an extent that she had not fully recovered from the effects of the accident at the time of the trial. The plaintiff in her amended statement

of claim sets out in paragraphs 5 and 6 that it was the duty of the defendants to construct and maintain a safe and proper crossing over their track at such point (McLean), and to construct and maintain proper and lawful approaches to said crossing; that by reason of negligence on the part of the defendants in not constructing the said approaches in a lawful and proper manner, and by reason of the defendants' negligence in not providing and maintaining a good and sufficient fence on the sides thereof, the plaintiff, on 19th February, 1906, in lawfully attempting to cross the railway with her team of horses, was upset over the side of one of the unfenced and unlawfully constructed approaches, and sustained thereby great bodily injuries. The defendants, in seeking to be relieved from liability, contend that there was no dedication of the crossing, express or implied or by way of estoppel or otherwise, and, if what they did amounted to dedication, the defendants were not bound to fence nor were they called upon to repair; that the plaintiff was guilty of contributory negligence; and, if she had a right of action, this was lost to her—the suit not having been brought within 6 months from the accident.

At the trial evidence was adduced to prove, and which did prove to my mind, defective construction and the dangerous condition of the crossing by reason of want of uniform width, the sloping or crowned top, and the total absence of fences on either side of the approaches. Bird, the son, stated that the south approach commenced about 52 yards south of the track, and that from this distance north the grade gradually increased up to the track, where it was about 8 feet above the street level, and that at the place where the accident happened the approach was 12 feet wide at the top of an embankment 9 to 10 feet high; that there was no room there for two teams to pass; that he had personally experienced considerable difficulty in crossing in this respect; that the embankment or approach on the top was not level, but rounded; that there were no fences on either side. Carrol, another witness, also swore that the approach was too narrow for teams to pass; that it was not fenced; and that a fence properly constructed would have prevented horses from shying off the grade, and would have made the crossing safer. Thomas Rollins thought the approach too narrow, and that, if there had been a fence, the horses and sleighs could not have gone over. This witness also said he himself had been pitched off over the same embankment.

From this it seems clear that the crossing was not a safe one by any means, and that the accident was primarily caused for want of a level top on the embankment or proper fences on the side thereof.

It is admitted that the crossing in question was constructed by the defendants, and intended for the public use, and that it was used by the public, and that it was not so constructed by leave of the Board of Railway Commissioners, nor was it ever accepted as a highway by the officers of the municipality.

The crossing was constructed by the defendants for the use of the public, was accepted and used by the public as such, and that on the invitation of the defendants.

Considerable time was taken up by counsel with arguments pro and con of the question of whether or not the doctrine of dedication express or implied applied. I do not think it necessary to consider the case from this point of view, as the liability of the defendants can be considered and determined without reference to the law of dedication or the provisions of the Railway Act regarding crossings.

As early as 1815 the question of liability under somewhat similar conditions arose. This occurred in Rex v. Kerrison, 3 M. & S. 526, and the law was there laid down by Lord Ellenborough as follows: "The undertakers of this navigation have a duty, as it seems to me, arising out of the execution of their own powers under the Act. The Act enables them to cut new channels as occasion should require; and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge. Can we put any other construction upon the Act but this, that the legislature intended that so far as regarded the making the river navigable, and the cutting new channels for that purpose, neither public nor private rights should stand in their way, but still they should make good to the public in another shape the means of passage over such ways as they were empowered to cut through. What has been done is not a mere incommoding the passage, leaving the public a partial enjoyment of the highway, but it is total deprivation of the means of using it."

Toms v. Township of Whitby, decided in 1874, 35 U. C. R. 195, in appeal, 37 U. C. R. 100, is the leading case in Ontario bearing on the question, and the authority of this case has been referred to with approval in numerous subsequent cases. In the Toms case, Wilson, J., goes very ex-

haustively into the question of the liability of companies and municipalities to construct and maintain. The first count of the statement of claim in the Toms case charged it there to be the duty of the defendants to have placed proper guards and railings along the sides of approaches constructed by them to be used as a highway so as to render the highway safe. After reviewing a host of authorities Wilson, J., said at p. 209: "Railway companies have been held bound to protect their engines from emitting sparks which were likely to produce injury so far as injury could from such cause be guarded against. It required no enactment to impose this liability; it arose from the reasonableness and necessity of the case." Pigott v. Eastern Counties R. W. Co., 3 C. B. 229, was referred to; and on the same page: "I am of opinion, then, if a guard or fence were necessary to make this road safe for the public use, that it was the duty of the defendants to furnish such protection, and, if they did not do so, and damage has resulted therefrom, that they are liable civilly in an action for the injury sustained."

In Oliver v. United English R. W. Co., L. R. 9 Q. B. 409, the defendants' railway line had been constructed before any of their special Acts of Parliament had been passed. and it was contended on behalf of the defendants that it was not part of their duty to keep in repair a crossing erected by them across the highway. Cockburn, C.J., in delivering judgment, stated that "the principle of the case of Rex v. Kerrison and the other cases cited clearly applies to this case."

In Manitoba, the Court of Queens Bench in Moggy v. Canadian Pacific R. W. Co., adopted the same principle. Taylor, J., delivered the judgment of the Court (reported in 3 Man. L. R. at p. 209). Rex v. Kerrison is there mentioned and followed, as is also Oliver v. United English R. W. Co.; and People v. New York Central and Hudson River R. R. Co., 74 N. Y. 302, is referred to with approval. In the latter case the liability to construct approaches was discussed, and the Court held that it was the duty of the defendants not only to properly make approaches but to keep them in suitable repair. Having taken possession of the old highway and substituted a new and different one, they must preserve it in a state, as far as practicable, of original usefulness.

In referring to this decision, Mr. Justice Taylor comments on it as follows: "We consider the Supreme Court of

New York to have correctly expressed the law, and that where a railway company has crossed a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than an inch above or sink an inch below the level, but also to construct and maintain such approaches at each side as may be necessary to enable persons using the highway to avail themselves of the crossing. It is only where they have done that, that they can be said to have restored the highway to its former state, or to such state as not to impair its usefulness." In speaking of the crossing in Moggy v. Canadian Pacific R. W. Co., the same learned Judge remarks: "As to the width of a crossing, it would be difficult to lay down any positive rules for a country so sparsely settled as this, but the company here having made a crossing of plank 14 feet, we think they should have provided for the grading of the approaches being the same width and not have left them sloping off at each side of the grading within that width."

In Hanson v. Canadian Pacific R. W. Co., 4 W. L. R. 385, a decision of the Supreme Court of the North-West Territories, at p. 388, the following statement of the law under discussion as applied to that case will be found: "Moreover, the company had built this sloping platform and sidewalk for the purpose of enabling persons coming to and going from the station to pass to and fro thereon; in other words, they invited that portion of the public to do so, and under those circumstances, where there was any danger such as I have stated, it was their duty, apart from any statutory enactment, to take reasonable steps to prevent accidents occurring. In Smith v. Niagara and St. Catharines R. W. Co., 9 O. L. R. 158, 160, 4 O. W. R. 526, Street, J., who delivered the judgment of the majority of the Court, lays down the following: 'The cases seem to have established that, apart from that section (the 256th section of the Railway Act of 1888) and in cases in which it is not applicable, a duty is cast upon the defendants to take reasonable precautions at dangerous points for the avoidance of accidents.'"

Elliott on Roads and Streets gives the law at p. 659 as follows: "When a road or street is opened and public travel is invited thereon, it must be made reasonably safe for such travel." At p. 842: "Where the corporation is given power to construct its crossings in such a manner as may be essential to the convenient transaction of its

business, it may, it has been held, change the grade or surface of the highway, if necessary, provided the crossing be kept in good repair and convenient for travellers. But this rule can not, as we believe, be so extended as to authorize a railroad corporation to so construct grades as to endanger the lives of citizens. The right to cross a highway does not authorize an appropriation of any part of it, nor a material interference with the public travel, and the duty to restore the highway and to erect and maintain the necessary structures required to make it reasonably safe and convenient, is a continuing duty, incumbent upon the company without any express statutory requirement . . . The obligation to maintain the crossing generally begins as soon as the railroad is located over it. This duty usually extends only to lawful highways, but, if the company has made a crossing public by its own invitation or license, it is generally required to keep it in repair. . . . Railway companies must so construct and maintain their premises which abut upon highways and their tracks which run along or across highways that they shall not cause injury to travellers who are lawfully and properly using such highways, and, if a company is negligent in this respect, it will be liable to a traveller who, while exercising due care on his part, is injured by such negligence." Numerous American cases are cited by the authors as authority for this statement of the law. Kearney v. London R. Co., L. R. 5 Q. B. 411, is also cited. The same authors in the work on Railroads, at p. 1668, say: "Something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveller to get on, over, and off the crossing in safety. Proper approaches and embankments necessary to enable the traveller to reach and leave the crossing are a part of the crossing, and the railway company must construct and maintain them." At p. 1794 it is stated that "where a railway company, whose duty it is to restore and keep in repair a highway crossing, negligently fails to perform that duty, it will be liable to a traveller upon the highway who, in the exercise of due care, is injured thereby." It has also been held that "if it constructs a crossing at a point where all the travel is, although not the true line of the highway

as established, it is liable for a defect in such crossing the same as if it were on the true line of the highway." These propositions are supported by Moberley v. Kansas City R. Co., 98 Mo. 183; Farley v. Chicago, etc., R. Co., 42 Iowa 234; Gulf R. Co. v. Greenlie, Am. & Eng. R. R. Cas. 322; Moggy v. Canadian Pacific R. W. Co., 3 Man. L. R. 209; Town of Roxbury v. Central Vermont R. Co., 121 Vt.; Collier v. Georgia, etc., R. Co., 76 Ga. 611.

In the judgment appealed from reference is made by the trial Judge to that part of the decision of the Board of Railway Commissioners in Re Reid and Canada Atlantic R. W. Co., 4 Can. Ry. Cas. 272, where it was laid down that "no Court or authority other than the Board can make it lawful for either the railway company or any other body to construct highways to cross the line of railway." This statement is doubtless true, but has, to my mind, little or no bearing on the question of liability of a railway company under circumstances like these under discussion. In my opinion, the defendants were bound to construct such a crossing as would render it reasonably safe for persons to ride and drive over the same, and, having acted as they did in constructing a defective and insufficient crossing, and in inviting the public to use it in this condition, they must be held liable, irrespective of the Railway Act, and whether or not said construction was authorized or was unlawfully constructed . . . using the word "unlawfully" in the sense in which the word "lawful" was intended in Re Reid. It is not open now to the defendants to say that the crossing was unlawfully constructed.

As to the question, did the injury arise from the defective state of the crossing as the proximate cause, or was the proximate cause the action of the horse? I think the answer to this question should be that the proximate cause of the damage as against the defendants was the defective state of the approaches on the crossing. The case of Toms v. Township of Whitby, 35 U. C. R. 195, in appeal 37 U. C. R. 100, is an authority in favour of this proposition. Wilson, J., at p. 219 of the report, after a lengthy review of cases, expressed his conclusion in the words: "The defendants, I think, are directly liable for the injuries done, because it did happen by reason of the defective state of the road, and that was the direct, immediate, and proximate cause of the damage." At p. 224: "But for the defective state of the road, the damage now complained of would

never have happened, and there is in this case no other culpable act to which it can be attributed." Richards, C.J., at p. 226, remarks: "The mere fact that the horse was restive and broke the waggon, or was for the time being not under control of the driver, cannot relieve the defendants from their responsibility. One of the very objects of the guards to a bridge is to prevent just such accidents, and when they occur and injury is sustained in consequence of the omission of the corporation to keep the bridge in a reasonably proper state of repair, I fail to see how they can free themselves from liability unless they can shew that the party complaining has been guilty of want of reasonable skill or care in driving. The mere fact that the horse shied, as it is termed, does not imply want of care or skill in driving." In appeal the Chief Justice of the Court of Appeal expressed his opinion at p. 104 that the defendants had, "contrary to their duty in that behalf, neglected to maintain the locus in quo in a proper state and condition so as to protect travellers who had occasion to use the highway from danger of a serious character. . . . The defendants' duty was not only to erect but to maintain. . . . . I am of opinion that the facts proved warrant the conclusion that the accident arose from the negligence of the defendants in permitting the railway which had been erected along the line of the embankment to become useless for want of necessary repairs; that the horse backing was a casualty not attributable to want of reasonable care and skill in driving, and would not have resulted in any injurious result if the embankment had been properly fenced." Burton and Patterson, JJ., the other Judges of the Court of Appeal, were of the same opinion.

In Foley v. Township of East Flamborough, 26 A. R., Osler, J.A., quoting Sherwood v. City of Hamilton, 37 U. C. R. 410, and Toms v. Township of Whitby, says at pp. 45 and 46; "I do not regard the fact that the horses were running away at the time of the accident as by any means a conclusive answer to the plaintiff's right to recover. Their driver was still endeavouring to control them, and both he and the deceased were travellers on the highway. It may be well that Sullivan could not recover if it was his fault that the horses were not under control, but, assuming that he was not negligent and was suing for his own loss, the question would be whether that loss would have been sustained but for the defect in the way. I think Sherwood v.

City of Hamilton, 37 U. C. R. 410, a well decided case, and it, as well as Toms v. Township of Whitby, in the same volume, in appeal, p. 100, support that conclusion. So long as the driver is trying to manage and recover control of his horses which are carrying him over the road, I think he has the right to complain if by reason of a defect in the road he sustains an injury while he is in that situation. I do not see that it matters that he has lost control over his horses for one minute or five, or why existence of the defect may not properly be held to be the proximate cause in the one case quite as much as in the other. In both it was a natural and probable result of the defendants' neglect to repair the road that such an accident should happen at the place in question, whether at the moment of passing it the horses were under control or not." This learned Judge refers also to Town of Prescott v. Connell, 22 S. C. R. 147, Engelhart v. Farrant, [1897] 1 Q. B. 240, in support of the proposition that the defect in the road was the proximate cause or an effective cause of the accident, in other words, "a cause of which the accident was a sufficiently natural and to be looked-for consequence."

As to the contention of the defendants that the action was not commenced within 6 months after the injury complained of, I agree with the judgment in this respect of Clement, J., in Northern Counties Investment Trust Limited v. Canadian Pacific R. W. Co., 13 B. C. R. 130, 139.

The injury suffered by the plaintiff does not seem to me to have been of a serious nature. It was thought unnecessary after one visit of the physician to require his further attendance, and the plaintiff some time after, in making a demand on the defendants, claimed $500, and I think $300 a sufficient sum to award her.

I am, therefore, of opinion that this appeal should be allowed and the judgment of the Court below in favour of the defendants be reversed, and judgment ordered to be entered for the plaintiff for $300 damages with costs of the action and of this appeal.

WETMORE, C.J.:—I with very great hesitation agree with the result arrived at by my brother Johnstone in this case. I am satisfied that the defendants are not liable for statutory negligence; that is, for the omission to do something that the statute requires them to do. On the other hand, I quite agree with my brother Johnstone that the defendants,

having constructed the way in question across the railway and built the approaches thereof for the purpose of enabling the public to cross over the railway, and having placed the sign-board "Railway Crossing" there, invited the public to use the road and crossing for the purposes the defendants intended it for. That being so, they were bound to take reasonable precautions to prevent accidents occurring. I adhere to what I laid down in Hanson v. Canadian Pacific R. W. Co., 4 W. L. R. at p. 388, and cited by my brother Johnstone in his judgment.

The difficulty I have had in this case is in bringing my mind to the conclusion that the defendants were guilty of any actionable negligence at common law. It is contended that the defendants were liable in respect of 3 acts of negligence, namely:—

(1) In constructing the road too narrow

(2) In rounding it.

(3) In not fencing it on either side.

In view of the fact that the distance from the top of the structure to the bottom was so high, I am not very much impressed with the idea that the narrowness of the road made the structure a negligent one, or the fact that it was rounded. Twelve feet was not too narrow for a single team to pass easily, and the rounding did not strike me as anything more than the proper and usual crowning of a way of that description. I gather from the evidence that it never occurred to any one that this structure was dangerous until this accident occurred. I may say that something was urged with respect to the grade of the approach; in the first instance, it occurs to me that the steepness of this grade was not very objectionable when we consider that the plaintiff's son, who was driving on the occasion of the accident, stated that he was going up it at the rate of 7 miles an hour; and, in the next place, this accident could in no sense be attributable to the steepness of the grade. It appears to me that the witnesses in testifying with respect to this crossing were testifying more in relation to its suitability for traffic than to its danger. Take, for instance, the following testimony of Carrol:—

"Q. What is your opinion as to the nature of this crossing at the time the accident happened with respect to its adequacy for people going across there in safety?

"A. There had been several complaints made to me about the crossing before this accident occurred, and after.

"Q. What is your opinion as to the adequacy of that crossing as a public crossing at that time, and as to its safety for people going across with teams?

"A. It was all right with one team to cross, but two teams going across could not go past on that approach in safety."

That would all seem to indicate that the witness had reference to the efficacy of the crossing—whether one could cross properly or safely with two teams. In this instance they were not crossing with two teams at the time the accident occurred. Then Rollins, speaking of the approach, testifies:—

"Q. Did you form, at the time, any idea as to its width?

"A. Not exactly. It was my first experience on the crossing, and I thought it was narrow; that it was narrower than the most I had ever heard of."

"Q. What is your opinion with respect to the nature of that approach; that is, taking teams across backwards and forwards there,—is it a reasonably wide approach for teams?

"A. Not at that time I had reference to. It is in better shape now.

"Q. Is it a reasonably safe approach for crossing for teams, backwards and forwards? What do you say as to that at that time?

"A. I don't think it was in a proper condition at that time. The opinion I formed of it was that it was too narrow, and that it was not high enough; that the track was so much higher; that it was hard to get up on the track."

It is true that Rollins testfiied that he came on this crossing subsequently and got pitched off his sleigh, but there is no evidence to shew how that occurred. That may not have been occasioned by reason of the approach at all. It is just left there, so that piece of testimony proves nothing. Therefore the testimony of Rollins does not carry the matter any further than that of Carrol. All this testimony seems, to my mind, with its surroundings, to point, as I have before stated, in the direction that the witnesses were talking about the suitability of the road for traffic, and not as to its dangerous charcter. I draw attention to the fact, which is. I think, very noticeable, that there is not one single witness who voluntarily testifies to a defect in this structure by reason of it not being fenced. In every instance the learned counsel for the plaintiff had to ask a leading question and draw the witness's attention to it to

get it out; and I must say that I am not as a rule very much impressed with testimony that is brought out in that way. It seems to me that where testimony is of a character most essential to prove the case for the party for whom a witness is called—probably the most essential—it is very suspicious that in order to get it out counsel has practically to put the testimony in the mouth of the witness.

I will just bring my own experience and knowledge into this case. I have seen railway crossings in all directions over this country, and I cannot call to mind one single instance where an approach to the railway (whether it is overhead, by subway, or on the level) has been fenced. I have seen fences at the sides of highways leading up to cattle-guards, but, wherever the approach has been higher than the level of the surrounding ground, these fences have been in the ditch. I do not mean to say that that would be any answer to an action where the company were bound to fence by statutory provision, and did not do so and an accident occurred by reason of such omission; but it makes me doubt whether under such circumstances there would be negligence at common law. Then, take the narrowness of the approach: there are many ways built on road allowances through sloughs, not as wide as the approach to this railway was; horses are liable to shy on those places, conveyances to be precipitated down the dump, and serious accidents occasioned. Would any person or authority be liable for damages under such circumstances? It was urged, however, at the argument by counsel for the plaintiff that the fact that Parliament had legislated with respect to highways, providing for the construction of fences along approaches to railway crossings on such highways of the character of this approach in this case, was sufficient to apprise the defendants that without such fencing the approach was dangerous. I was very much struck with this argument. I am satisfied that, taking the width of the approach, the height of it above the ditch, and the fact that it was not fenced, it was a dangerous crossing, and with this, and in view of the legislation by Parliament to which I have referred, I have with great hesitation arrived at the conclusion that the defendants ought to have been aware of the dangerous character of this structure, and are therefore liable for negligence at common law apart from the statute.

PRENDERGAST, J., concurred.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

H. W. LAIRD CO. v. ADAMS.

Guaranty — Letters — Construction — Consideration — Statute of Frauds.

Appeal by defendant from judgment of WETMORE, C.J., ante 312.

The appeal was heard by PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

J. F. Frame, Regina, for defendant.

J. F. L. Embury, Regina, for plaintiffs.

NEWLANDS, J.:—This is an action on an alleged guaranty. The defence is a denial that defendant gave a guaranty, and an allegation that the alleged guaranty does not comply with the Statute of Frauds.

On 14th February, 1907, the plaintiffs wrote the following letter to defendant: "Mr. W. R. Bailey, of Wolseley, has called upon us to-day and placed an order with us for confectionery stock. Mr. Bailey informs us that you are backing him up financially and asks us to write you to this effect. Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us. We may state that Mr. Bailey has placed a very modest order with us, and thanking you in advance." In reply the defendant wrote plaintiffs on 15th February: "Yours received to-day asking me about Mr. Bailey; yes, he is honest and a good business man; I have backed him before, and no trouble; I am willing to help him any time on his papers." To which the plaintiffs sent the following answer: "Your favour of February 15th is received. We thank you very much for your information, and beg to state that we hold a high opinion of Mr. Bailey, and, as he mentioned to us that you were backing him up, it was for our own information, instead of applying to our commercial agencies, that we thought it better to write to you direct."

The question is, is the letter of defendant a guaranty or an offer to indorse Bailey's paper?

There is only one direct question asked in the plaintiffs' letter of 14th February—"Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us." Inferentially the question is asked: are you backing Bailey up financially? Defendant writes in answer to this letter: "Yes, he is honest and a good business man; I have backed him before, and no trouble; I am willing to help him any time on his papers." It seems to me that this is an answer to both questions—that defendant will hold himself responsible for Bailey's account with plaintiffs, and that he is backing him financially.

Mr. Frame, for defendant, argues that this letter of defendant's is simply a statement that he has helped him before, and an offer to indorse Bailey's note. What then is the meaning of the words, "Yes, he is honest and a good business man?" He was not asked anything about Bailey's honesty or business capacity, and plaintiffs' letter does not call for any reasons why he backed him before. The interpretation I put on those words are that they are an answer to the direct question asked, "Yes (because) he is honest and a good business man." The latter part of his letter does not refer particularly to this transaction; it is merely an intimation that he is not only willing to help Bailey in this transaction, but any other time.

If the interpretation I have put on defendant's letter is correct, plaintiffs did not need to make any formal acceptance of it. They had already intimated their willingness to accept defendant's guaranty by asking for it. Besides, their letter of 16th February is really an acceptance. They thank defendant for his information. What is that information? The important information to them is that he will guarantee Bailey's account, and that, as they intimate in their letter, does away with the necessity of applying to the commercial agencies. Now the only information they could get from a commercial agency was Mr. Bailey's financial standing, and the necessity for this information is done away with by defendant giving his guaranty. They could not have obtained from these agencies any knowledge of the fact that defendant had backed Bailey before or that he was willing to back him again; nor, very probably, could they have obtained the information that he was honest and a good business man. It seems to me, therefore, that plaintiffs' reply of 16th Febru-

ary refers only to defendant's guaranty, which does away with the necessity of inquiring into Bailey's financial standing.

Mr. Frame cited in support of his proposition McIvor v. Richardson, 1 M. & S. 557; Moseley v. Finkler, 1 C. M. & R. 691; and Kastner v. Winstanley, 20 C. P. 101. In all those cases it was held that defendant did not give a guaranty but only offered to give one, and, as there had been no actual acceptance by the plaintiff, the defendant was not bound. As I have held that there was an actual guaranty in this case, not an offer to guarantee, these cases do not apply.

There was some evidence given by defendant as to his intention in writing his letter of 15th February; that he had indorsed Bailey's note before and would indorse it again, but would not back him in any other way; but, if defendant wrote his letter in such a way that a reasonable man would believe that he was assenting to the terms proposed by plaintiffs, he is bound by it, no matter what his intention was. In Smith v. Hughes, L. R. 6 Q. B. 597, Blackburn, J., at p. 607, says: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon the belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Now, that is what I think defendant has done. His letter is written in such a way that plaintiffs believed he was guaranteeing Bailey's account, and therefore gave him the goods, and defendant cannot now say that he did not give a guaranty, but intended something different.

There is nothing in defendant's contention that the writing in this case does not satisfy the Statute of Frauds, because the amount of the goods ordered by Bailey being known, it was not communicated to defendant by plaintiffs and not set out in the letters. The cases he cites, with the exception of Campbell v. McIsaac, 3 N. S. R. 287, were decided before the passing of the Mercantile Law Amendment Act, since which it has not been necessary to set out the consideration in the guaranty. In Campbell v. McIsaac the decision is to the effect that, although it is unnecessary to set out the consideration in the guaranty, because of that Act, it is still necessary for there to be a consideration, and it must be set

out in the pleadings. This question does not arise in this case.

I think the appeal should be dismissed with costs.

JOHNSTONE, J.:—This is an appeal from a judgment in favour of the plaintiffs in an action against the appellant Adams wherein he was held liable to the respondents on the contract of guaranty contained in the following letters:—

"February 14th, 1907.

"R. Adams, Esq.,
"Indian Head.

"Dear Sir:—Mr. W. R. Bailey, of Wolseley, has called upon us to-day and placed on order with us for confectionery stock. Mr. Bailey informs us that you are backing him up financially, and asks us to write you to this effect. Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us. We may state Mr. Bailey has placed a very modest order with us, and thanking you in advance, we are, yours truly, The H. W Laird Co., Ltd."

"Indian Head, Feb. 15, 1907.

"H. W. Laird & Co.,
"Regina, Sask.

"Dear Sir:—Yours received to-day asking me about Mr. Bailey. Yes, he is honest, a good business man. I have backed him before, and no trouble. I am willing to help him any time on his papers. Yours truly, R. Adams."

The decision in the case rests upon the construction to be placed on the word "yes" in the letter from Adams to the respondents. Should the word "yes" be considered as an answer to the question contained in the letter of 14th February, namely, "Mr. Bailey informs us that you are backing him up financially, and asks us to write you to this effect," the liability of the defendant in the action is not established. On the other hand, should the word be held to have been in reply to the remaining portion of this letter: "Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us," or to have been used generally as a reply to the whole letter, then the plaintiffs were rightly held entitled to recover.

The first question presenting itself on a perusal of these letters is, how are they to be considered? Upon the construction depends the conclusion whether or not there was a

good and sufficient guaranty. In Wood v. Priestner, L. R. 2 Ex. 66, Kelly, C.B., at p. 68, says: "The question in this case depends not merely on words; but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction. It is, therefore, necessary to look at the existing state of things, and, looking to that, to construe the words in such a way as we consider most consistent with the intention of parties; not, indeed, considering any statement of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents of the meaning of both." This course was adopted by that Court in arriving at a conclusion in that case, and the law as there laid down has been followed in subsequent cases. That construction, therefore, should govern which would have the result of giving to these letters the object intended by the parties, which intention must be gathered from the correspondence constituting the alleged contract and the surrounding circumstances. What were these surrounding circumstances? The respondent firm writes to the appellant informing him of the placing of an order for a modest sum by Bailey with them; that Bailey, with whose financial standing it cannot be reasonably supposed from the correspondence the respondents were familiar, had informed the respondents that Adams had been backing the intending purchaser, and that they, the respondents, had been requested to write to this effect, and this letter contains this direct question to Adams—"Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us." To this the appellant replies by letter, and it must be remembered that the whole ambiguity is contained in this letter of Adams.

We should take into consideration that the writer is not an educated man, which fact is disclosed by the letter itself; that in all probability inferences would have to be drawn to collect his full meaning from any letter which he would write on business matters, and in arriving at this meaning no act should be ascribed to him which would render his letter abortive or which would place it in the light of having been written to deceive or mislead. Words contained in it which could be made to operate as an intelligent answer to the letter to which it was a reply should be given that effect rather than an effect which would render these words senseless or of little or no import.

Now, let us look at the letter under consideration. Adams, having in view his answer to the letter of the respondents, a letter which, if not then before him, had that day been received by him and read, writes and says: "Yours received to-day asking me about Mr. Bailey"—that is, asking if the writer were backing Bailey as represented and if he (Adams) would hold himself responsible for his (Bailey's) account. The writer then proceeds to say, in just such a manner as might be expected of a man of his intelligence, "Yes, he is honest, a good man of business." Now, Adams was not requested to recommend Bailey's honesty, and, if he had wanted to express himself as to his honesty, and had desired to limit his letter to this, he could have done so effectively without the use of the word "yes;" and it is only reasonable to assume, and it must be intended in view of the authorities (Smith v. Hughes, L. R. 6 Q. B. 597), that he used the word "'yes" in reply to both questions submitted to him, and to thereby give to his answer that character of completeness which the occasion required rather than give to it a meaning which would have been conveyed without the use of the word "yes" at all.

There is another circumstance not to be overlooked in arriving at the intention of Adams. He was a hotel-keeper, a man having practical experience in the buying of goods, from which experience he would be aware that the shipping of the Bailey order probably depended on his prompt reply to the respondents' letter and the acceptance by him of the responsibility of guaranteeing payment.

I agree with the judgment of the learned Chief Justice in this case, and, in my opinion, the appeal should be dismissed with costs.

LAMONT, J. (dissenting):—This is an appeal by the defendant Adams from the judgment of the learned Chief Justice in favour of the plaintiff in the action against the defendant Bailey for goods sold and delivered and against the defendant Adams as surety for the payment of the same. The guaranty in writing on which the plaintiffs claim to hold the defendant Adams liable is contained in the following letters:—

"February 14th, 1907.

"R. Adams, Esq.,
"Indian Head.

"Dear Sir:—Mr. W. R. Bailey, of Wolseley, has called on us to-day and placed on order with us for confectionery stock. Mr. Bailey informs us that you are backing him up financially and asks us to write you to this effect. Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us. We may state Mr. Bailey has placed a very modest order with us, and thanking you in advance, we are, yours truly,

"The H. W. Laird Co., Ltd."

To this Mr. Adams replied, on 15th February, as follows:

"Indian Head, Feb. 15th, 1907.

"Mr. H. W. Laird & Co.,
"Regina, Sask.

"dear sir yours Rec today asking me about Mr. Bailey yes he is honest and a good buisness man I have Backed him Before and no trouble I am Willing to help him any time on his papers yours truly R. Adams."

On receipt of this letter, the plaintiffs again wrote to the defendant as follows:

"February 16th, 1907.

"R. Adams, Esq.,
"Indian Head.

"Dear Sir:—Your favour of February 15th is received. We thank you very much for your information, and beg to state that we hold a high opinion of Mr. Bailey, and as he mentioned to us that you were backing him up it was for our information instead of applying to our commercial agencies that we thought it better to write to you direct. Thanking you, we are, Yours very truly,

"The H. W. Laird Co., Ltd."

These were all the communications that passed between the plaintiffs and the defendant. A few days later the plaintiffs shipped to Mr. Bailey the goods ordered by him, which amounted to $261.20.

The first question requiring consideration, it seems to me, is, "Are we to take the letters of the 14th and 15th February and find the contract in them, or must we consider along with these the plaintiffs' letter of 16th February?" I am of opinion that the 3 letters must be read together. I

think the principle governing this point was laid down by the House of Lords in Hussey v. Horne Payne, 4 App. Cas. 311. In that case the Lord Chancellor said: "Where you have to find your contract or your note or memorandum of the contract in letters, you must take into consideration the whole of the correspondence that has passed. You must not, at one particular time, draw a line and say, 'We will look at the letters up to this point and find in them the contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged or agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them."

As to the rule of construction to be applied, I think the rule laid down by the learned Chief Justice is the right one, namely, that the contract of guaranty is to be interpreted in the same way as any other contract. This rule was expressed by Kelly, C.B., in Wood v. Priestner, L. R. 2 Ex. 70, and by Gwynne J., in Kastner v. Winstanley, 20 C. P. 101. And in Nottingham Hide Co. v. Bottrell, L. R. 8 C. P. 697, Stirling, J., said: "Every case must, no doubt, depend entirely upon the language used, and the document must be looked at with reference to surrounding circumstances."

Parol evidence is admissible to shew what were the surrounding circumstances, but it is not admissible to put a different complexion on the language used than it would otherwise bear. The surrounding circumstances of this case appear to be that Mr. Bailey, being desirous of obtaining a supply of confectionery stock, called on the plaintiffs, and in conversation told them that the defendant Adams, who is his father-in-law, was backing him financially in business, and asked the plaintiffs to write to Adams. This they did, by their letter of the 14th. The defendant Adams received the plaintiffs' letter on 15th February and answered it the same day, but without having the plaintiffs' letter before him at the time. On the following day the plaintiffs acknowledged the receipt of Adams's letter. On the 19th or 20th the goods were shipped to the defendant Bailey, without any further notice to or communication with the defendant Adams. Bailey did not pay the account when it became due, and some time afterwards the plaintiffs' solicitor wrote to the defendant Adams for payment, who then, for the first time, knew that the plaintiffs had shipped goods to Bailey. There does not appear to have been any previous dealing between the plaintiffs and either of the defendants. The defendant

Adams had previously assisted Bailey financially by backing his paper in the Union Bank, but in no other way.

These being the circumstances under which the letters were written, we now come to the consideration of the letters themselves. The plaintiffs, in their letter of the 14th, in my opinion, ask two questions: one a direct question, in which they ask if the defendant will hold him responsible for the amount of Bailey's account; the other an inferential question, as to whether Bailey was correct in informing them that he (Adams) was backing him up financially. In Adams's reply of the 15th, which is anything but clear, he uses the word "yes." If "yes" is construed as an answer to the direct question in the plaintiffs' letter, then there is a good contract of guaranty, and the defendant is liable. If, on the other hand, the word "yes" is to be taken as an answer to the inferential question, I am of opinion that there was no concluded contract, for the remaining portion of the defendant's letter contains no more than an expression of his willingness to indorse Bailey's paper.

Although the matter is not by any means free from doubt, a consideration of the language of the letters themselves and the circumstances under which the defendant's letter was written, has led me to the conclusion that the word "yes" in the letter of the 15th was in answer to the inferential question as to whether or not he was backing up Bailey financially. It will be observed that Adams's letter is without punctuation, and bears evidence that the defendant is not an educated man. In the letter he says "yours Rec today asking me about Mr. Bailey yes he is honest," etc. Bearing in mind that the defendant had not the plaintiffs' letter before him when he wrote this, his answer, in my opinion, shews that it was that portion of the plaintiffs' letter in which reference was made to Mr. Bailey that he had in mind, and that it was the inferential question in the plaintiffs' letter that he was affirming in the word "yes." Viewed in this light, his whole letter seems to me to be consistent. If he had been referring to the guaranty, I think it more natural and likely that his letter would have begun something like this: "Yours to-day received asking me about the guaranty." Then the latter portion of his letter seems to me to be more consistent with the view I have expressed above than that he was intending to give a guaranty. He says: "I have backed him before, and no trouble. I am willing to help him any time on his papers." This statement, read in the light of the fact that he had previously indorsed Adams's paper to the

bank, seems to me to be no more than an expression of his willingness to indorse his paper again, and to be inconsistent with the contention that he intended his letter to be a guaranty. If this letter was to be a guaranty, there was no object in saying that he was willing to again help him on his papers.

In the case of Nottingham Hide Co. v. Bottrell, Keating, J., after reciting the letter of the defendants, asks this question, "What would any man of business understand by that?" I apply this test to the letter of Adams in the present case, and the best answer that can be given is, "What did the plaintiffs —who are business men—understand by it?" There understanding of it we have in their letter of the 16th instant. From this letter it is clearly obvious to me that the plaintiffs did not at that time construe Adams's letter as a guaranty. They considered it only as a report on Bailey's integrity and standing which they obtained from Adams instead of from a commercial agency. They made no reference whatever to a guaranty or to the fact that they were going to forward the goods on the strength of Adams's letter. They say: "As he mentioned to us that you were backing him up, it was for our information, instead of applying to our commercial agencies, that we thought it better to write to you direct."

Here they have, to my mind, treated Adams's letter as referring only to the question that he is backing Bailey financially, and that they had sought the information from him direct instead of in the usual way—through the commercial agencies. What information concerning the guaranty could the commercial agencies have given? Clearly none; and yet the plaintiffs' letter is a plain intimation that they could have obtained the information from the commercial agencies; but, as Bailey had told them Adams was backing him, they wrote direct to Adams.

With great deference to the learned Chief Justice and my brother Judges who hold a contrary view, in my opinion the defendant's letter contains no more than an expression of his willingness to again indorse for Bailey. Putting this construction on his letter, the 3 letters, taken together, are consistent and reasonable throughout, and it is the only view which seems to me to be consistent with the plaintiffs' letter of the 16th.

I would allow the appeal with costs.

PRENDERGAST, J., agreed with LAMONT, J.

The Court being divided, the appeal was dismissed.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

REILANDER v. BENGERT.

Defamation—Slander — Proof of Words Spoken — Foreign Language—Interpretation—Innuendo — Amendment — Damages.

Appeal by defendant from judgment of NEWLANDS, J., in favour of plaintiff in an action for slander.

A. Ross, Regina, for defendant.

J. Balfour, Regina, for plaintiff.

The judgment of the Court (WETMORE, C.J., PRENDERGAST and LAMONT, JJ.), was delivered by

WETMORE, C.J.:—This is an action for slander, and was tried before my brother Newlands some time during 1907. The action was commenced on 19th December, 1902, and the slander was alleged to have been spoken on or about 15th July, 1901. The statement of claim contains several charges of slander, but the learned Judge found that the only slander established was that set forth in the second count of the claim. A portion of the evidence in the case was taken before Mr. Justice Richardson, who at the time was one of the Judges of the Supreme Court of the North-West Territories, and some of the witnesses were afterwards examined before the clerk of that Court. It was agreed by counsel on behalf of both parties that my brother Newlands should determine the case upon the evidence so taken before Richardson, J., and the clerk. This was agreed to in writing. Counsel for the defendant afterwards objected to Newlands, J., trying the case upon that testimony. but the learned Judge held that they were bound by counsel's agreement, and said that he would try the case on the material which they had agreed to.

One of the grounds of appeal is that the learned Judge was in error in holding this, inasmuch as the defendant had not consented to any such arrangement. I am of opinion that the learned Judge was correct. If counsel choose to

come into Court and deliberately so give a consent of this character on behalf of their clients, which I am of opinion that they have a clear right to give, they will not be allowed to set it aside in the manner in which it was sought to set the consent in question aside. If counsel have, as a matter of fact, made consents which they were not authorized to make, it is a matter to be settled between them and their clients. Other parties are not to be prejudiced or put in a different position by it.

It will only be necessary for me to give my attention to the question whether the slander alleged in this second count was proved. The alleged slander was contained in words spoken in the German language, and are, with the innuendo as alleged in the claim, as follows: "'William Reilander hat gestohlen dreizehn oder fürzehn pfund speck von mein haus.' The said words mean in English, and were understood by those who heard them to mean 'William Reilander (meaning the plaintiff) stole thirteen or fourteen pounds of pork from my house,' meaning thereby that the plaintiff had been guilty of theft." The only person who established these words by the evidence was Joseph Obergavitch, and he did not establish them exactly in the language used. The words he swore to were: "Er ist hinaus und hat die Machsine genomen und falsches neck-yoke und dreizehn oder fürzehn pfund speck gestohlen;" and he interpreted them to mean in English: "He has drove out, has taken the grass-mower, wrong neck-yoke, and has stolen 13 or 14 lbs. of pork." Joseph Obergavitch does not establish the words used in the count in question, because he used the word "fort" instead of "gestohlen," and he states that he understands "fort" in German to mean "stolen." It is not a question, however, of what this man understood the words to mean; the question is, what did they mean? And, therefore, his testimony has not the effect of establishing the alleged slander. He did not happen to be present when the words were spoken to Joseph Obergavitch which I have before set out, although Joseph was present when the words sworn to by Jacob Obergavitch were used; but Joseph was not paying any attention to what was then stated, and, therefore, his testimony proved nothing, in so far as the last mentioned words are concerned. No other witness testified to the words proved by Joseph Obergavitch. One Paul D. Brett was called as a witness for the defendant, and he swore that the German word for "stolen" is "gestohlen," for "steal" "stehlen" and for "stole" "stahl." Jacob

Obergavitch, therefore, must have been mistaken in understanding the word "fort" to mean "stolen."

Now the question arises, were the slanderous words substantially proved by Joseph Obergavitch? I am of opinion they were. It may be necessary to amend, but that can very readily be done. The words proved did not establish the allegation that the defendant stole this pork from the plaintiff's house, but it is not necessary to prove all the words alleged if enough has been proved to establish that an offence of the character alleged in the statement of claim was imputed by the words. I think that has been done.

It is contended that because the statement of claim alleged that the words charged a stealing of the pork from the house, it was not sufficient to establish that the words used charged a mere stealing, and that the punishment is different in each case. I am of opinion that the gist of the offence was the theft; and a theft from a house and a theft that is not from a house are each thefts. It is only a question of degree affecting the punishment.

Then it is alleged that there is no evidence to establish that these words being spoken in the German language were spoken in the presence of persons who understood German. Now it is unquestionably necessary, if words are spoken in a foreign language, that they must be spoken to persons who understood them, and that that must be proved. For instance, if slanderous words are spoken in the presence of the person slandered and other persons, and they are in a foreign language, and no person present understood each language except the person alleged to have been slandered, they would not be actionable. But in this case the slander was spoken to a man who, I must assume, understood German, because he states and swears what the German words were, and then he states what they mean in English. I am of opinion that this is prima facie evidence that the man to whom they were spoken understood these German words, and it was not questioned that the words used were in the German language.

It has been urged that an interpreter should have been called, who, it was almost contended, must be proficient in German; that an ordinary German person would not be sufficient. I cannot appreciate this argument.

I am of opinion that the second count of the claim should be amended by striking out the words there and substituting the following: "'Er ist hinaus und hat die Machsine genomen

und falsches neck-yoke und dreizehn oder fürzehn pfund speck gestohlen.' The said words mean in English and were understood by those who heard them to mean: 'He (meaning the plaintiff) had been out, has taken the grass-mower, wrong neck-yoke, and has stolen 13 or 14 lbs. of pork.'" I would draw attention to the fact that the innuendo in the statement of claim was, so far as the words originally set out in the claim are concerned, not that the plaintiff had been been guilty of "theft from the house," but that he had been guilty of "theft." In my opinion, this amendment being made as I have directed, the appeal should be dismissed with costs. It was also urged that the damages awarded herein ($250) were excessive; all that it is necessary to say is that, in view of the fact that the defendant pleaded practically justifying the words used, and attempted to prove his justification, I am of opinion that he got off very lightly with the amount of damages so awarded.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

NEW HAMBURG MANUFACTURING CO. v. WEISBROD.

Sale of Goods—Action on Promissory Notes Given for Price —Defects in Goods—Notice — Counterclaim for Breach of Warranty—Failure to Return Goods—Continued Possession—Delay — Acceptance — Repudiation—Rescission of Contract.

Appeal by defendant from judgment of NEWLANDS, J., in favour of plaintiffs in an action upon three promissory notes given by defendant for part of the price of a portable engine and separator and other goods sold by plaintiffs to defendant, and a counterclaim by defendant against plaintiffs for damages by reason of the defective condition of the separator.

The appeal was heard by WETMORE, C.J., PRENDERGAST and LAMONT, JJ.

H. V. Bigelow, Regina, for defendant.

J. F. L. Embury, Regina, and R. A. Carman, Regina, for plaintiffs.

LAMONT, J.:—I agree with the learned Chief Justice that there is no defence to the two notes of $200 each. I also agree that the retention of the machine for two years by the defendant deprives him of the right now to return it; but I am of the opinion that he is entitled to succeed on his counterclaim. The plaintiffs warranted the machine "to be well built, of good material, and capable of doing good work when properly operated."

The evidence shews that the machine was not well built, of good material. The decks were clearly incapable of doing good work. The evidence also shews that the defendant during the fall of 1903 complained to Jacob Kohlruss, one of the agents from whom he purchased, about the machine, and discussed taking the machine back, but Kohlruss told him to "keep the machine, that he was going to fix her up all right." Under these circumstances, as was said by Harvey, J., in giving the judgment of the Court en banc in New Hamburg Manufacturing Co. v. Klotz, 3 W. L. R. 404, "continued possession and use of the machine by the defendant cannot, by reason of the promise made by the plaintiffs' representatives, be held to be evidence that the machine answered the warranty."

Before the opening of the threshing season of 1904, the plaintiffs' agent put a new set of decks in the separator, and as the defendant counterclaims for only one day's lost time in 1904, I think we are bound to assume, notwithstanding some evidence to the contrary, that during the season of 1904 the machine worked fairly satisfactorily until the engine broke down.

I would, therefore, allow the counterclaim with the exception of the one day lost at Thompson's farm, which the evidence shews was in the season of 1904.

PRENDERGAST, J., concurred.

WETMORE, C.J.:—This is an appeal from the judgment of my brother Newlands awarding judgment for the plaintiffs for the amount of their claim. On 28th May, 1903, the

defendant by written document ordered from the plaintiffs a 14 h.p. horse drawn portable engine and 32 x 56 separator, with short bagger and 150 feet of rubber 6 in. 4 ply belt. These goods were delivered at Balgonie. When they arrived, however, the defendant exchanged the engine for a heavier portable engine than the one ordered, which was also supplied by the plaintiffs. Subsequently this last-mentioned portable engine was exchanged for a traction engine. A number of notes were given for the amount of the purchase money for this property, and at the time of the last mentioned exchange of engines $500 more was agreed to be given, and for that $500 two notes of $200 each and one of $100 were given. This action was brought on three of these notes: one, dated 15th October, 1903, being for $600, and the other two being the two of the notes given for $200 each at the time of the last exchange of engines. The evidence presents no defence whatever to either of the notes for $200, and, so far as the plaintiffs' claim is concerned, the only question that arises is whether there is any defence with respect to the $600 note. The order for the machinery and property which I have hereinbefore mentioned contains the following:—

"*Warranty.*

"All machines manufactured by us are warranted to be well built, of good material, and capable of doing good work when properly operated. During the first season, should any break occur through defective material or workmanship, we will replace the broken parts free of charge. If when started the machine should be in any way defective, and not work well, the purchaser should give notice promptly to us or the agent from whom he purchased, and reasonable time allowed to remedy the defect, if any (with the purchaser's necessary and friendly assistance), when (if it cannot be made to do good work, it will be replaced by a new machine. Failure to give immediate notice, as above, or continued possession of the machine, whether kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. No agent has any authority to add to or abridge or change this warranty in any manner."

Although the property ordered, as before stated, was property each article of which was independent of the other in a way, it was, no doubt, intended to be used together, and the order was for the whole of the articles at a lump price, and I

am therefore of the opinion that the sale was a sale of the whole of the articles, and not an independent sale of each one, so that, if the defendant was in a position to repudiate for non-fulfilment of conditions as to one part, he could repudiate for the whole. The defendant commenced to operate the engine and separator on 28th September, 1903, and I am satisfied that it did not work satisfactorily. The defendant promptly gave notice of the trouble to Kohlruss, the plaintiffs' agent from whom the property was purchased, and a person was sent out to endeavour to repair the defect. This man repaired it in a way, but the breakage occurred again immediately afterwards. The defect, as I gather from the evidence, was at first that the decks were not made of proper wood, and then, later on, that something was wrong with the hangers, by which the decks were slung, or the wood to which these hangers were attached on the body of the machine (whether laterally or vertically, does not appear very clear), and that the wood on the body of the machine to which these hangers were attached was not sound and would not hold the hangers. The evidence of the plaintiffs' witnesses, however, in rebuttal, in so far as it refers to the wood to which these hangers were attached, would tend to shew that there must be a mistake if they were stating what was true, because these hangers merely pass through blocks of wood and were bolted to plates above them. However, whether that is so or not, the evidence establishes to my satisfaction that this machine did not work properly; for some reason or another the decks were continually breaking or coming down, and it was established that this was a serious defect. This had happened continually. According to the defendant, it happened every day, and involved his going into Balgonie for the purpose of his getting it repaired or of endeavouring to find some person to repair it. The plaintiffs' expert came out 3 or 4 times during the year 1903, but was unsuccessful in making the machine work properly. Nevertheless, the defendant worked it down to the end of the season of 1903 as best he could. The defendant states that about the end of the season of 1903 the plaintiffs' agent Kohlruss told him to keep the machine, as he was going to fix it up all-right. What time in the fall of 1903 this happened I am not prepared to say. It seems it was on an occasion when he went to speak to Kohlruss about taking the machine back The defendant retained possession of the property, and in the threshing season of 1904 started threshing again, and he had

the same trouble. The plaintiffs' expert came out on two occasions during that season, and endeavoured to make the machine work properly, but to no effect, and the defendant kept working it until about 1st December of that year, when he stopped by reason of his engine breaking down. It is quite clear that, if the engine had not broken down, it was the defendant's intention to go on working the machine. There was nothing wrong with the engine, in so far as any liability or blame that would attach to the plaintiffs was concerned: the whole trouble, in so far as the plaintiffs were concerned, was in the separator, to which machine, I may state, the decks belonged. The defendant had been sued upon one of the $600 notes originally given for the machinery, and had settled it, and after all this occurred he brought in the engine and separator and left them on the premises of William Cockwell, who was the plaintiffs' expert who went out to endeavour to fix the machinery.

It is contended that under these circumstances the defendant had a right to return the machine and refuse to pay the note sued on or any other note given for the purchase price of this property. There was some evidence that notice in writing of the defect in this machine was given to the plaintiffs by a letter written by one McInnis, and addressed and mailed to the plaintiffs at Pilot Butte. I have very grave doubts whether the evidence established the giving of this notice. There is not a particle of evidence that it reached the plaintiffs, except a statement made by this man Cockwell, and referring to a something that was in it respecting himself. In so far as may be gathered from the evidence of McInnis and the defendant, there was nothing in that letter of the character mentioned by Cockwell, and, any way, I cannot see how Cockwell's admission can affect the plaintiffs. He was not their agent for any such purpose. However, that is not very material, because I am of opinion that notice of the defect was given to Kohlruss. It was not necessary, according to the agreement, that the notice should be in writing. The question whether the defendant can set up the matter I have mentioned as a defence to this action would depend on the clause in the agreement which is headed "Warranty." I am of opinion that the sale in this case was a conditional sale, and it is not necessary to refer to secs. 15 and 16 of the Sale of Goods Ordinance (ch. 39 of the Consolidated Ordinance), because that it was a conditional sale is to be gathered from the warranty. That provision evi-

dently contemplates that the machine went to the defendant on trial. The provision as to what was to be done if a break was to occur through defective material or workmanship is to be read in connection with the warranty that the machine was to be built of good material and capable of doing good work, and if during the first season it turned out that a break occurred through defective material or workmanship, the broken parts were to be replaced, and if, when started, it turned out to be defective and did not work well, the plaintiffs, after receiving notice in the manner prescribed, were to make it do good work, and, if it did not, they were to replace it with a new machine. Now, if it had turned out that the machine did not do good work (and, as I have stated, this machine did not do good work), and the plaintiffs, after notice, had sent their man out, and he failed to makke it work properly after reasonable efforts, I am of opinion that, provided that it was not replaced by a new machine, the defendant might have returned it and successfully resisted an action to recover the price. But the authorities are clear that where a buyer has a right to return property after trial because it does not come up to what was represented, he has got to act promptly. He cannot hold property and successfully resist an action for the price, unless he does. He cannot use the machine, after giving it a reasonable trial, and then turn round and state to the vendor, "I won't pay you." It has been urged, however, in this case, that the plaintiffs led this man along by sending out their expert from time to time to endeavour to repair, and by telling him to "hold on," as it was stated Kohlruss did in the fall. All that it is necessary to say in answer to that is that I assume, in the absence of any evidence to the contrary, that this man had ordinary intelligence, and, according to his testimony, he knew through the whole season of 1903 that this machine was breaking down every day in respect of these decks, and that these decks were an important part in the proper working of this machinery. He knew that the expert had come out time and again and could not remedy it. Therefore, he must have known that it was hopeless to expect that this machine could be made satisfactory. Nevertheless he held on to it and operated it down to the end of the season of 1903, as I have stated, and continued to operate it in the season of 1904, though it broke down again and again in the same way; and he made no effort to return; and, as I have stated, when he did stop working, it was only because the engine broke down.

Under such circumstances, I hold that he accepted the machine, and is not in a position to resist an action for the payment of the price. I will just draw attention to some further facts in this case, to shew you how unjust it would be to hold that he had not accepted the machine by his conduct. When he brought the machine to Cockwell's premises and placed it there, he brought the whole outfit, both engine and separator. Now, there is no complaint about the engine. The evidence establishes that the engine was a good one, when the plaintiffs delivered it to him. It had become injured through the fault of one or more of the defendant's employees, and when it reached Cockwell's yard it was in a very delapidated condition. Now, I have held that the contract was an entire one with respect to all the machinery; and should I hold the contrary to what I have held, with respect to the plaintiffs' right, the result would have been that the plaintiffs would have had to take back, not only the defective and broken separator, but they would also have had to take back the engine, which had become broken and dilapidated through no fault of theirs, but from the fault of the defendant.

In Town of Richmond v. Lafontaine, 30 S. C. R. 155, a contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation, and allowed the contractors 30 days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works, without specifying particular defects, but made use of the works complained of for about 9 years, when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract. The Chief Justice, in delivering the judgment of the Court, is reported (at p. 157) to have said: "I am of opinion that this appeal must be dismissed. It would not be just and equitable now to rescind this contract after some 15 years' enjayment by the appellants of the respondents' works, and when the respondents can no longer be put in their original position." It is true that this case arose under the Quebec Code, but the equity of it appeals to my sense of justice, and I think it may well be followed by the law applicable to this country.

It was urged on behalf of the defendant that the plaintiffs could not rely upon the continued possession, because it was

not pleaded. It is true that it was not pleaded, but the statement of claim, after setting out what I have called the warranty, alleges as a breach that the terms of the warranty were not satisfied, but, on the contrary, "the separator . . . was so defective and of such poor material and workmanship that the defendant could not operate same, and by reason of such defects, which the above-named plaintiffs failed to remedy, although duly notified thereof by the above-named defendant, the said outfit became useless to the defendant, and he was unable to operate same for the purposes for which it was bought." The plaintiffs joined issue upon that allegation, and I have distinctly found what is entirely contrary to this allegation, because I have found that he could and did operate it for two seasons. Perhaps it might have been quite sufficient for me to have rested my judgment upon finding the issue on that paragraph in favour of the plaintiffs. However, I have gone further, and endeavoured to thresh out the merits of the case, and therefore the defendant can have no good reason to complain. I have come to the conclusion that the judgment of the learned trial Judge, in so far as the plaintiffs' claim was concerned, should be affirmed.

The defendant has counterclaimed for damages by reason of the defective condition of the separator; and he contends that what I call the warranty clause is a warranty that the machine in question was well built, of good material, and capable of doing good work when properly operated. Taking the whole warranty clause together, I am inclined to the opinion that what I have last quoted from it amounts to a warranty, and that the clause immediately following provides for a trial during the first season, and, if any defect arising as therein specified could not be properly or sufficiently remedied, that the buyer would have the right to return the machine if it was not replaced by a new one, leaving the general warranty which I have cited to operate, even supposing the defective machine had not been returned during the first season or at all. But I am met by the concluding paragraph of this warranty clause, by which it is provided that continued possession of the machine, whether kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. Now that is the agreement of the parties, signed by the defendant himself. Is it to be treated as of no effect whatever? I am of opinion that effect has to be given to it by the Courts. If people will sign a contract contain-

ing a provision of this sort, they have got to take the consequences; the Courts are powerless to help them, unless the legislature steps in by enactment clothing the Courts with power to do so. The defendant, therefore, has agreed that continued possession of the machine shall be conclusive evidence that it fills the warranty. I have held in a preceding part of this judgment that he did keep continued possession of the machine, continued possession of such a character that prevented his returning it under this warranty clause. I can only repeat what I have so stated with respect to that possession, and hold that it was a continued possession which comes within the meaning of the clause which I have noted, and is conclusive evidence that the machine fills the warranty. It has been urged, however, that it is not open to the plaintiffs to set up this answer to the counterclaim, because it was not pleaded. It is true this matter was not pleaded, but the agreement makes the continued possession a matter of evidence, and thus supports the first paragraph of the reply to the counterclaim denying that the separator or any part of the threshing outfit was not as warranted, or that it was not built of good material, or was of poor workmanship and design, and incapable of doing good work. The defendant's appeal, in so far as the counterclaim is concerned, must, therefore, in my opinion, be dismissed with costs. In my opinion, therefore, the defendant's whole appeal should be dismissed with costs, and the judgment of the trial Judge affirmed.

SASKATCHEWAN.

MARCH 31ST, 1908.

FULL COURT.

STEELE v. McCARTHY.

Vendor and Purchaser — Contract for Sale of Land—Payment by Instalments — Default — Rescission — Time of Essence of Contract — Intention of Parties—Penalty — Forfeiture—Relief against—Provision of Judicature Act — Retroactivity — Interest — Notice of Cancellation — Wording of Contract—Blank in Printed Form—Counterclaim—Return of Moneys Paid.

Appeal by plaintiff and cross-appeal by defendant from judgment of NEWLANDS, J., 6 W. L. R. 396.

The appeal was heard by WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.

Norman Mackenzie, K.C., for plaintiff.

C. E. D. Wood, Regina, for defendant.

WETMORE, C.J.:—This is an appeal from the judgment of Newlands, J. On 22nd May, 1905, the plaintiff and defendant entered into an agreement in writing under seal whereby the defendant agreed to sell to the plaintiff section No. 25 in township 16, range 19, west of the second meridian, for $9,600, to be paid in 3 equal annual consecutive instalments of $3,200 each, the first of which instalments was to become due and be paid on 1st November, 1907, with interest at the rate of 7 per cent. per annum to be paid on the said sum or so much thereof as should from time to time remain unpaid, both before or after the same became due, the interest to be paid yearly on 1st November of each year, all interest upon becoming due to be forthwith treated as purchase money and to bear interest at the rate aforesaid, and in the event of default being made in payment of principal, interest, taxes, or premiums of insurance, or any part thereof, the whole purchase money should become due and payable. The interest was to be computed from 1st November, 1905, and to be paid yearly in advance. The plaintiff covenanted to pay the said sum with interest on the days and times set forth in the agreement. The plaintiff also covenanted to pay taxes from and after the date of the agreement. The defendant agreed, on the payment of all sums due under the agreement, to convey the lands to the plaintiff. The plaintiff also agreed to break 400 acres of the land in the year 1905 and 220 acres in the year 1906. The plaintiff was to have the right to possession of the premises. And it was provided also that in default of payment of the said moneys and interest, or any part or parts thereof, on the days and times provided for payment, or of performance or fulfilment of any of the stipulations, covenants, provisoes, and agreements on the part of the plaintiff in the agreement contained, the defendant should be at liberty to determine and put an end to the agreement, and to retain any sum or sums paid thereunder as and by way of liquidated damages, in the following method, namely, "by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement addressed to the pur-

chaser at post office;" and the agreement went on to provide that "at the end of 20 days from the time of mailing the same the said purchaser (the plaintiff) shall deliver up quiet peaceable possession of the said lands and premises, or any part thereof, to the vendor (the defendant) or his agent immediately at the expiration of said 20 days." And it was specially provided that time should be in every respect of the essence of the agreement. The plaintiff entered into possession of the premises. The interest that fell due on 1st November, 1905, was paid on or about 5th November of that year. This payment was accepted by the defendant. The plaintiff only broke 325 acres of land in the year 1905. An arrangement was arrived at between the parties by which $300 was paid by the plaintiff to the defendant in respect of the omission to do the 75 acres of breaking that was in default. This arrangement was arrived at about 5th November. The plaintiff stated that it was to be paid in advance and credited on the interest that would fall due in November, 1906; and the defendant, on the other hand, stated that the sum of $300 was paid in lieu of the breaking which was to be done that year. The trial Judge has found that the defendant's version of this arrangement is correct. I may remark in passing that, although this arrangement was made about 5th November the money was not paid under it until 16th February following, when a cheque was sent for the amount dated at Vankleek Hill, Ontario. There was a memorandum on this cheque that bore out the plaintiff's version as to how the amount was to be applied. Nevertheless, I have arrived at the same conclusion as the trial Judge. The 6th paragraph of the statement of claim sets out that "the plaintiff having failed to break 75 acres of the said 400 acres, it was verbally agreed between the defendant and the plaintiff that in lieu of the breaking the plaintiff should be at liberty under the said agreement to pay the defendant on account of unmatured interest and principal a sum calculated at a rate of $3.50 per acre for all shortage in respect of all of said breaking, and that such sum or sums as paid in advance should stand in lieu of the security which would be forwarded the defendant by virtue of the said breaking and should eventually be credited on the payments due on the said land under said agreement as the same fell due." The $300 was arrived at by putting the value of the breaking at $4 an acre instead of $3.50. This allegation in the statement of claim is,

in my opinion, practically in accordance with what the defendant has set up. It is true the defendant accepted this cheque with this memorandum on it which I have before mentioned, and had it cashed, but at the same time, in my opinion, that does not work an estoppel to prevent his setting up the true character of the transaction. As stated by the defendant in his testimony, this breaking was required to be done under the agreement to secure him an increased value of the land should the plaintiff fail to carry out the agreement and the land be thrown back on his hands. That being so, the payment of the value of the breaking would not apply to the next instalment of interest falling due, for in that case it would afford no security at all. The common sense of the thing, therefore, strikes me as being against the plaintiff's contention. On 1st November, 1906, the second instalment of interest fell due, and the plaintiff omitted to meet it. On 2nd November the defendant mailed to the plaintiff by registered letter, addressed to the plaintiff at his home at West Derby, Vermont, a letter in the following terms: " Dear Sir: I find that the terms of the agreement of sale of section 25-16-19 that interest which should be paid in advance on $9,600 at 7 per cent. has fallen due on November 1st, 1906. This interest has not been paid, and, according to the terms of the contract, the agreement is void. Please accept this as notification thereof. Yours truly, E. McCarthy." The plaintiff was away from home when the letter arrived, and did not return until the 28th of the month, and he received the letter on the 29th, and that day wired one Bell in Regina to tender the defendant $360, which he claimed, with the $300 paid for default of breaking, and which according to him was to be credited on this interest, plus the interest on that $300 from the time it was paid, would make up the amount of the interest falling due on the agreement on 1st November, 1906. I should state here that according to the plaintiff's testimony the $300 paid to the defendant in lieu of the breaking was to bear interest from the time it was paid until the interest on the agreement fell due. This tender was made by Bell, and the defendant refused it. The next day Bell made a tender of $672, the full amount of the interest down to 1st November, 1906, and the defendant refused to accept that. On 26th March the plaintiff made a tender to the defendant of $1,135.35, being for interest due and an allowance for breaking not done. Dur-

ing the year 1906 the plaintiff, according to his own statement, only broke 100 acres of the land, or, in other words, for the years 1905 and 1906 he broke 425 acres. According to the defendant, he only broke something under 400 acres. The balance of the breaking, whatever it may be, has never been done. The defendant refused this tender, and the amount has been paid into Court. Assuming the plaintiff to have only broken 100 acres in 1906, I cannot from any figuring I can make arrive at $1,135.35 as being the correct amount due under the agreement; however, in view of the conclusion I have reached, this is not very material.

It was contended in the first place on the part of the plaintiff that time was not of the essence of the agreement. I may dispose of that matter very shortly, because the agreement specifically provides that time shall be of the essence of the contract, and, that being the agreement of the parties, the cases seem to me to be all to the effect that it must be given effect to as a matter of agreement.

It was next argued that the alleged notice contained in the defendant's letter of 2nd November was bad: (a) because the agreement did not provide for such notice to be given; and (b) that, if it did, the notice was not in accordance with the provisions contained in the agreement for such notice. It was urged that the agreement did not provide for a notice, because the post office to which the notice was to be addressed was left blank, and it was contended from that that it was not the intention to provide for notice of cancellation at all. I cannot bring my mind to that conclusion. This agreement is divided into paragraphs which are numbered; take, for instance, paragraph 3 of the agreement—that paragraph provides for the payment of taxes by the plaintiff and also that he will insure the buildings " now on or to be erected on said lands in the sum of dollars." Could it be urged successfully that because that blank was not filled in the whole paragraph was not intended to be in the agreement? If so, the provision for payment of taxes was not intended; but the plaintiff admits his liability to pay the taxes. I agree with the trial Judge that the omission to fill in this blank has not the effect of rendering the clause of no effect. But I differ with him in this respect—that the provision for sending the notice, instead of providing that it should be addressed to wherever his address might be for the time being, provided that it should be addressed to him at his place of residence

or domicile. In this case it was addressed to him at his place of residence or domicile, at West Derby, Vermont. The other objection taken to the notice is that it did not contain a statement intimating an intention to determine the agreement, but it absolutely determined the agreement. I quite agree that a notice that a party to an agreement intends to take advantage of a forfeiture must strictly follow the provision of the agreement under which it is given, but, in order to ascertain whether or not it does, we must look at the provision. The provision is that the notice was to be signed "by or on behalf of the vendor intimating an intention to determine this agreement . . . and at the end of 20 days from the time of mailing the same, the said purchaser shall deliver up quiet and peaceable possession." If the provision had been that the notice was to state a time after service or mailing, as the case might be, on which the agreement was to become void, then I could see force in the argument which has been advanced on behalf of the plaintiff, but no such time is mentioned; the provision is simply that at the expiration of 20 days from the mailing the party was to deliver up possession. Now, under such circumstances, I am of opinion that the notice stating, as this did, that the agreement is void, was practically an intimation of an intention to determine the agreement. Suppose the notice had followed the exact language of the agreement, and set forth that it was the intention of the defendant to determine the agreement, the effect of it would have been to render the agreement void. The notification stated this in effect, and amply informed the plaintiff of the intention of the defendant. I may add that this plaintiff seems to have been behind hand in carrying out every single requirement of the contract, and he has done this in the face of his express agreement that time was of the essence of the contract. The instalment payable on 1st November, 1905, was really not paid until 14th November, although I have, with the trial Judge, held it was paid on or about 5th November, 1905, and I have done that because the pleadings admit that fact. He failed to do the breaking provided for during the year 1905; he failed to do the breaking provided for during the year 1906; he did not pay the instalment of interest due on 1st November, 1906, or offer to do so, until nearly a month after it became due, and then only apparently under the pressure of the notice cancelling the agreement: and he did not pay the taxes according to his agree-

ment. Everything that was to be done by him seems to have been not attended to promptly. I am of the opinion that the defendant was correct under his agreement in taking the steps he did to cancel the agreement. I cannot find under the evidence that the defendant has in any way waived his right to determine the agreement.

The only question remaining is: what is the effect of the provision in the agreement authorizing the defendant to be at liberty to determine and put an end to the agreement and of his giving the notice in pursuance of such provision? Does it have the effect of cancelling the agreement? And, if it does, can the Court grant relief against it? No question arises here with respect to forfeiture of deposit, because no deposit was paid or provided for when this agreement was entered into. The simple question is: was the provision that time should be of the essence of the contract, and that, on default of keeping the covenants and making the payments provided for, the defendant could give notice cancelling the agreement and render it void, a matter of agreement or a provision respecting a penalty? I am of opinion that it was distinctly a matter of agreement, and not a provision creating a penalty. I am quite at a loss to understand how the term "penalty" can apply to a provision of the sort I am discussing. If a provision merely related to the forfeiture of payments made, I can quite understand how the Court might construe the payment proposed to be forfeited in the nature of a penalty; but here is an agreement by which the parties have mutually agreed that on default of the performance of certain covenants or the making of certain payments by one party to the other party, such other party may determine and put an end to the agreement; that is distinctly matter of agreement, and if parties choose to insert such a clause in a contract they must be held to it. This Court cannot make an agreement for them or alter the agreement they have made. It is stated in some of the books that it is a question of intention whether time shall be of the essence of the contract or not. When the parties have expressly provided in their agreement that it shall be, I see no way by which the Courts can, on any principle known to me, escape giving effect to their mutual agreement.

In Barclay v. Messenger, 43 L. J. Ch. 449, where the question arose whether time was of the essence of the contract, and although apparently there was no express pro-

vision that it should be, Sir George Jessel, M.R., at p. 455 states as follows: "Now, the first point to be considered is, was time originally of the essence of this contract? I am clearly of opinion that it was. I do not know how it could have been more strongly expressed than this: An agreement to pay on a given day or at a deferred date if agreed upon (there was no deferred date agreed upon), and if not the contract to be void. It seems to me, there being nothing whatever to be done under the contract by the defendants, every obligation being on the plaintiffs, that it is impossible to put any other interpretation on this contract than that both parties intended that the date of payment of the £1,000 was to be of the essence of the contract." A question arose in that case whether an extension of time was not tantamount to a waiver of the provision as to time. After holding that in this case it only amounted to an extension of the time and not a waiver, the learned Judge goes on, at p. 456, as follows: "If that is so, on the 26th of August the vendors were entitled to say that the contract was at an end." Practically the same view of this question seems to have been taken by Stuart, J., in Stringer v. Oliver, 6 W. L. R. 519; and in Labelle v. O'Connor, 11 O. W. R. 95, 15 O. L. R. 519, the Court held that, where time was of the essence of the contract and it was provided that the vendor might, unless payments were punctually made, resell the lands, time was of the essence of the contract, and the vendor was at liberty to rescind the contract.

I will express no conclusion with respect to the question of a forfeiture of a money payment. I will refer to one case which relates to that question, however, as it may tend to throw some light on the questions upon which I have turned this branch of the case. In Wallis v. Smith, 21 Ch. D. 243, Jessel, M.R., at pp. 256, 257, and 258, discusses the question as to what provisions in a contract of this character are to be treated as penal or otherwise, and at p. 253 he states the following: "I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule does not apply (i.e., the rule treating the amount forfeited as a penalty), and that the bargain of the parties is to be car-

ried out." This remark, it seems to me, applies also to what I have hereinbefore held with respect to the question of terminating the agreement. This case, it seems to me, comes within the class of cases referred to by Jessel, M.R., as just before stated.

I do not feel it necessary to discuss the question of forfeiture arising with respect to any deposit, because there was no deposit in this case; nor do I feel it necessary to discuss any question with respect to any payment made—the only payment made, apart from that on account of the breaking that was not done, was the agreed interest on the purchase money. In my judgment, that would stand in the same position as rent, and the plaintiff is not entitled to have it repaid to him, because he has had the use of the land.

As great stress was laid in the argument on In re Dagenham (Thames) Dock Co., L. R. 8 Ch. 1022, I feel it incumbent on me to discuss that case to some extent. In the first place, I am of opinion that the agreement in that case was not the same as the agreement in this. The agreement there was that upon the instalment remaining unpaid not being paid on the day named, the vendors might repossess the land. (Time was there also made of the essence of the contract, as in this case). It will be observed that the agreement in this case provides that in case not only of the failure to pay an instalment of the purchase price, but of failure to perform any of the covenants contained in the agreement, the vendor should have the right to declare the agreement cancelled. I think that difference brings the case within what I have cited as laid down by Jessel, M.R., in Wallis v. Smith. There is another difference in In re Dagenham (Thames) Dock Co. which occurs to me, and which I think may have influenced the learned Judges who decided that case to a very considerable extent, and that was that the company that was engaged in constructing the work had purchased the land in question for purposes beneficial to the public; or, in other words, the land was purchased towards the construction of a public utility. And James, L.J., distinctly draws attention to that fact in his judgment. But, if I am in error in these respects, and In re Dagenham (Thames) Docks Co. should be considered to be on all fours with this case, I am, with great deference, unable to follow it. I am unable to discover that that case, viewed from the standpoint in which I am now considering it, has been

squarely followed by any other English case. It was followed, however, in Great West Lumber Co. v. Wilkins, ante 166, and Crawford v. Patterson, ante 183; but with due respect to the learned Judges who respectively decided these cases I am unable to agree with them. A provision of the character which is contained in such an agreement as that in question is put there for a purpose. It is put there for the purpose of securing the performance of the contract on the part of the buyer, and to prevent the land being thrown back on the vendor's hands, possibly when the price of land may have become lowered, and so he would be deprived of the real benefit of his agreement. It is put there as a matter of agreement, with the full knowledge of the parties to the agreement and a full knowledge of what it is intended for, and, that being so, I can find no rule apart from the cases which I have just lastly mentioned which would enable a court of equity practically to treat the square agreement of the parties, intentionally entered into, as not serving such purpose. Where there has been a simple agreement for the sale of land, without any clause of the character I am discussing, and a payment has been made on account of the purchase money to the vendor, and he wishes to proceed on his remedy against the land for the balance, he could bring an action in a Court for foreclosure. It is also for the purpose of avoiding that necessity that a clause of the character in question is inserted in the agreement. This intention would be defeated if In re Dagenham (Thames) Dock Co. and Great West Lumber Co. v. Wilkins and Crawford v. Patterson are correct expositions of the law, as contended for by the plaintiff.

When I come to look at what the remedies of a vendor are as laid down by Beck, J., in Great West Lumber Co. v. Wilkins (p. 175), where a vendee has omitted to make payments or perform the covenants in the agreement, and that agreement contains a clause giving power to cancel it, it seems to me that they are of a very unsatisfactory character. He has got, first, a remedy by foreclosure. As I remarked a moment ago, he would have that any way, without putting such a clause in the agreement. Then he goes on to state that "if the purchaser has delayed or abandoned or repudiated the contract, all his rights under it are gone." Then he goes on further: "And if, though he has not abandoned or repudiated, the purchaser has nevertheless delayed an unreasonable length of time in fulfilling his terms, his right to

specific performance is gone." How is that going to be found out except by proceeding in a Court, if these cases lay down the law as contended for? If a vendor proceeds to take possession of the property without proceeding in a Court, he is liable to have an action launched against him for a declaration that the purchaser has not forfeited his agreement, or the Court will relieve him, and the defendant will have to pay the costs because he did just what the agreement of the parties provided and intended that he could do. It would seem to me, if all this was the case, in order for a vendor to make himself absolutely safe in a sale, the best plan would be to insist upon such a payment down as would keep him absolutely safe for the costs of the foreclosure suit, give a transfer to the purchaser, and take back the mortgage. Of course, if the buyer is personally financially sound, so that he could respond to an action on the covenant for the money, the vendor would be safe. But, if he is not, then the vendor is simply surrounding himself with the possible privilege of paying heavy costs. If there is no mortgage, and he brings an action to foreclose the agreement, he has got to pay the costs of foreclosure. If he takes possession of the land, on the ground that there had been unreasonable delay in carrying out the agreement, he is liable to have an action brought against him for a declaration by the Court that this buyer has not abandoned the property, that he has a right to redeem, or that he has a right to insist on this agreement as still binding, and the vendor would have the privilege of giving up the possession of the land and paying the costs of both sides, or of paying damages and the costs any way. And so the most likely effect of the clause in question, which was inserted to protect the vendor, would be to render him liable for a heavy bill of costs whenever he attempted to enforce it or act upon it under such clause. I prefer following what was laid down by Hunter, C.J., in Pearson v. Canada Permanent and Western Canada Mortgage Corporation, 1 W. L. R. 99, and by McGuire, J., in Forfar v. Sage, 5 Terr. L. R. 255, and I think these cases correctly lay down the law on the question.

In Great West Lumber Co. v. Wilkins the learned Judge who decided that case refers, at p. 173, to the fact that the Statute Law Amendment Act of the province of Alberta provides that, "subject to appeal, as in other cases, the Court shall have power to relieve against all penalties and forfeitures, and, on granting such relief, to impose such terms as

to costs, expenses, damages, compensation, and all other matters, as the Court sees fit." He states that he cannot find that there is any corresponding provision in the English Judicature Act; nor can I. It occurred to me that that learned Judge was very much influenced by this provision. At the time the action now before the Court was brought (26th March, 1907), when the judgment of the trial Judge was given (19th July, 1907), and when the notice of appeal was given (26th July, 1907), there was no such provision in the Judicature Ordinance or any statutory provision in force in this province. But a provision to that effect in all respects was contained in the Judicature Act, 1907 (ch. 8, sec. 30, sub-sec. 5), and it was suggested that under that provision this Court would have the right to grant the plaintiff relief. This Act came into force on 16th September, 1907. I am not prepared to say that this clause would not have a retroactive effect with respect to a contract made before that Act came into force. But, when I consider that, at the time my brother Newlands gave his judgment, the provision was not in force, and that that judgment was, in my opinion, right under the law as it then was, and that the effect of such judgment was to give the defendant a vested right to the land and to the possession of it, and that vested right and interest continued at the time the notice of appeal was given, I am of opinion that the clause I am now discussing ought not to be, and cannot on legal or equitable principles now be, held to have a retroactive effect to divest such vested right.

I am, therefore, of opinion that in so far as the p aintiff's appeal is concerned it should be dismissed with costs.

The learned trial Judge awarded, however, that the $300 paid to the defendant in lieu of the breaking should be returned to the plaintiff. The defendant had cross-appealed against this part of the judgment, and I am of opinion that the defendant's cross-appeal should also be dismissed with costs. All that it is necessary for me to say is that I am of opinion that that part of the decree was equitable and fair.

The judgment of the trial Judge both as to the claim and the counterclaim should be affirmed, and both appeals dismissed with costs, the general costs of the appeal to be taxed to the defendant, and the costs exclusively applicable to the cross-appeal to be taxed to the plaintiff. The $300 awarded to the plaintiff and the costs hereby awarded to him should be set off against the costs awarded to the plaintiff here and in the Court below, and, if there is then a balance in favour

of the defendant, it should be paid to him out of the moneys paid into Court by the plaintiff, and the balance of such moneys paid into Court be paid out to the plaintiff. If after such set-off there is a balance in favour of the plaintiff, he should have execution for the same, and the moneys so paid into Court should be paid out to him.

PRENDERGAST and JOHNSTONE, JJ., concurred.

LAMONT, J. (dissenting):—The question involved in this appeal is whether or not clause 7 of the agreement is penal in its nature and one against which the Court can and ought to relieve.

A perusal of the English cases on this question from Kemble v. Farren, 6 Bing. 141, down to the present day, shews that the decisions have not been uniform. The later cases, however, have established certain principles in accordance with which the question is to be determined.

The first principle to which I refer relates to construction, and is this, that the agreement must be construed so as to give effect to the real intention of the parties, and for that purpose the Courts must look, not only to the language of the agreement, but also at the surrounding circumstances

In Clydebank Engineering and Shipbuilding Co. v. Castaneda, [1905] A. C. 9, Lord Halsbury said: "A great deal depends upon the nature of the transaction, the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract," and so forth.

And in Pye v. British Automobile Commercial Syndicate, [1906] 1 K. B. 425, Bigham, J., said: "'A Judge must look at all the circumstances of each particular contract, to what the parties did, as well as to what they said."

Each case, therefore, must be determined by construing the language of the agreement in the light of the nature of the transaction, the surrounding circumstances, and the conduct of the parties in carrying it out.

Before examining the language of clause 7, there is another clause of the agreement that must be considered, and that is clause 10, which reads as follows: "Time shall be in every respect the essence of this agreement." Where the agreement contains this express stipulation, has the Court, even in the exercise of its equitable jurisdiction, the right to relieve the plaintiff from the forfeiture provided for in clause 7? At law, time was generally considered of the

essence of the contract, but in equity the Court will look at the substance of the contract rather than at its mere form, and will inquire as to the real intention of the parties.

In Fry on Specific Performance, p. 465, it is thus laid down: "Time is originally of the essence of the contract in the view of a court of equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract." And on p. 466 the learned author goes on to say: "In order to render time thus essential, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so."

In Roberts v. Berry, 3 DeG. M. & G. 291, Turner, L.J., said: "I have always considered that the Court looks at the substance and not at the mere form of the contract."

In Lowther v. Heaver, 4 Ch. D. 248, Lindley, L.J., said: "The agreement provides that time shall be of the essence of the contract, but time never was of the essence of the contract between these parties. No time was observed. The houses were not begun until when, according to the contract, they ought to have been finished. I do not think that the clause of re-entry on default for 21 days could have applied without a notice to make time of the essence of the contract."

In Barlow v. Williams, 4 W. L. R. 233, the plaintiff agreed to purchase from the defendant a lot in Killarney. The consideration was $125, payable $50 on 1st September, 1897, and the balance—$75—on 1st June, 1898. The first payment was made. The agreement contained the clause: "Time is to be considered of the essence of the agreement, and, unless all payments are punctually made at the time and in the manner above mentioned, these presents shall be null and void, and the said party of the first part shall be at liberty to re-sell the said land." The plaintiff did not pay the balance of the purchase on 1st June, as provided for in the agreement. Nothing was done by the vendor until 1902, when he sold the land. In that case Dubuc, C.J., said: "In the present case the agreement contains a provision stating that time is to be of the essence of the contract, but it does not appear that such was the real intention of the parties, and that this provision was to be strictly insisted upon." And Perdue, J., in the same case, said: "Time is originally of the essence of the contract, in the view of a court of equity, whenever it appears to have been the intention of the parties

that it should be so, and not to have been inserted as a merely formal part of the contract. Slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of any such stipulation, and whenever a party has done anything quite inconsistent with the supposition that he continues to hold his opponent strictly to his part of the engagement, he is to be taken to have waived it altogether. In addition to the receipt of part of the purchase money by the defendant after the time when it became payable, there was evidence that the plaintiff had been allowed to remain in possession of the south half of the lot. I think these circumstances were quite sufficient to warrant the trial Judge in finding that the real intention of the parties was to treat the stipulation as to time as merely formal, or, if essential in the first instance, to have been waived by their subsequent actions."

In In re Dagenham (Thames) Dock Co., L. R. 8 Ch. 1022, the company had purchased a piece of land for £4,000, of which £2,000 was to be paid at once and the remaining £2,000 on a day named in the agreement. In that case the agreement contained a clause with a provision that if the whole of the £2,000 and interest was not paid by that date, in which time was of the essence of the contract, the vendors might repossess the land as of their former estate, without any obligation to repay any part of the purchase money. The first £2,000 was paid, and the company let into possession, and they erected extensive works on the land. By another agreement the time for payment of the £2,000 was extended until 1st November, and this agreement also contained the following clause: "That if the whole £2,000 and interest was not paid by 1st November, 1869, of which time was to be of the essence of the agreement, the vendors were to be at liberty to retake and repossess the land and all works thereon and retain all moneys paid." The money was not paid on 1st November, and the trustees commenced an action for ejectment. In appeal, James, L.J., said: "I agree with the Master of the Rolls that this is a penalty from which the company are entitled to be relieved on payment of the residue of the purchase money with interest." And Mellish, L.J., said: "I have always understood that where there is a stipulation that if, on a certain day, the agreement remains either wholly or in part unperformed (in which case the damage may be either very large or very trifling), there is to be a certain forfeiture incurred, that stipulation is to be treated in the light of a

penalty. Here, when you look at the last agreement, it provides that if the whole £2,000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase money which they have paid. It appears to me that this is clearly in the nature of a penalty from which the courts will relieve."

In Cornwall v. Henson, [1900] 2 Ch. 298, the contract provided for the purchase money being paid by instalments, and in case of default in the payment of any instalment the whole of the unpaid instalment should become immediately payable, and in the event of default for 30 days in payment the vendor should be at liberty to resell the lands. The purchaser paid all the instalments except the last, which became due on 29th September, 1895. The purchaser left the land, and the vendor, being unable to find him, resumed possession of it, and endeavoured to sell it, but without success until March, 1898, when he let it for 3 years to a tenant. In June, 1898, the purchaser reappeared, and was prepared to pay the final instalment, which the vendor would not accept. He then commenced an action for specific performance of the agreement and damages in lieu thereof. It was admitted by counsel for the plaintiff at the trial that, owing to his long default, the specific performance could not be granted, but the Court held that he was entitled to damages. Webster, M.R., said: "I feel very grave doubt whether the doctrine of Howe v. Smith would apply to a case in which the purchase money was to be paid in instalments." And Collins, L.J., used the following language: "If the contract had contained an expressed stipulation that, on the non-payment of any instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty and would have relieved him from it as was done in In re Dagenham (Thames) Dock Co. . . . The defendant's case would have been substantially the same if only a shilling of the purchase money had been left unpaid by the plaintiff."

In Heynes v. Dixon, [1900] 2 Ch. 561, Rigby, L.J., in referring to the jurisdiction of the court of equity, says: "Outside cases within the Statute of Anne, the Court of Chancery alone had jurisdiction to relieve against forfeiture: see for a modern case of its exercise In re Dagenham (Thames) Dock Co., per James and Mellish, L.JJ." Here the Dagenham

case is cited as a modern instance of the exercise by the Court of its equitable jurisdiction to relieve against forfeiture.

In the latest case on the subject—Labelle v. O'Connor, 15 O. L. R. 519, 11 O. W. R. 95, the defendant agreed to sell to the plaintiff two lots in New Liskeard for $290, payable $100 cash, $75 in 5 months and 3 weeks, and the balance in 11 months and 3 weeks. The agreement was on a printed form, and contained a clause that time was to be of the essence of the contract, and that, unless the payments were punctually made, the vendor was to be at liberty to resell. The time for the payments of the purchase money was arranged to correspond with the time the defendant had to make payments to the man from whom he had purchased. The second instalment fell due on 15th November, 1905, and was not paid. Some correspondence took place between the parties, in which the plaintiff wanted further time. This the defendant never agreed to grant. In April, 1906, the plaintiff offered the defendant a cheque for the balance due, but this was refused, and he brought action for specific performance. The trial Judge held that the plaintiff was entitled to succeed. On appeal to a Divisional Court it was held (Meredith, C.J., dissenting), that the plaintiff was not entitled to have the agreement specifically carried out. In this case the Court was satisfied that it was clearly agreed and understood that the payments were to be promptly made. MacMahon, J., said: "It is true that the clause making time the essence constitutes part of the printed form of the agreement; but that the intention of the parties was that punctual payments of the instalments should be the essence of the contract is manifest from what took place between the plaintiff and Jeremiah O'Connor, who was expressly stipulating that the payments should be made at the time to meet those under the agreement with Ritchie. What greater precautions could have been adopted to have the contract prepared in conformity with what the parties had agreed upon than going to the solicitor and telling him the result?" And Anglin, J., pointed out that not only was there a clause in the contract making time of the essence thereof, but that adequate reasons for such stipulation had been communicated to the plaintiff, and he agreed thereto. And in the same case, in reference to the jurisdiction of a court of equity, he said: "It is also true, no doubt, that a default under a contract in which time is of the essence does not oust the Court of its jurisdiction or make it impossible for the Court to grant

specific performance after the expiration of the time stipulated for."

In Howe v. Smith, 27 Ch. D. 89, where the Court refused to give the purchasers either specific performance of the agreement or damages, Fry, L.J., said: "The purchaser has, in my opinion, been guilty of such delay, whether measured by the rules of law or equity, as deprives him of his right to specific performance or of his right to maintain an action for damages."

In Barclay v. Messenger, 22 W. R. 522, relied on by the defendant, the Master of the Rolls held "that it was impossible to put any other interpretation on the contract than that both parties intended that the date of payment of the £1,000 should be of the essence of the contract." And further on he said: "Looking to the nature of the subject matter and the conduct of the parties, quite independently of the question whether this is a case in which time is of the essence of the contract, the plaintiffs have not used that diligence which it was incumbent upon them to use to obtain the aid of a court of equity."

From these decisions it appears to me that the Court has the right to relieve against forfeiture; that Courts have invariably relieved when they were satisfied that the clause making time of the essence was only a formal part of the contract; and that it was not the real intention of the parties that the forfeiture should take place if the stipulations were not performed precisely on the day named; but where the Courts were satisfied that the real, serious agreement of the parties was that the things stipulated for should be performed precisely on the day named, they have refused to interfere, and have carried out the terms the parties agreed to. In determining whether or not the clause respecting time is a formal part of the contract, the Courts have considered the stipulations for breach of which the forfeiture is to take place, the conduct of the parties, and the surrounding circumstances.

In the case at bar, clause 7 provides that in default of payment of any instalment of principal or interest on the day it becomes due, or on failure of the purchaser to perform any stipulation in the agreement by him to be performed, the vendor was to be at liberty, (1) to cancel the agreement, and (2) to retain all sums paid thereunder as and by way of liquidated damages. The cancelling of the agreement would enable the vendor to retain, not only the lands, but all im-

provements made thereon by the purchaser, and these, together with the sums paid to the vendor, cost the plaintiff, according to the evidence, over $4,000. The stipulation, a breach of which enabled the vendor to appropriate to himself this $4,000 of cash paid and improvements made, are:—

(1) Non-payment of any part of the principal or interest, reserved in the agreement.

(2) Non-breaking of 400 acres during the year 1905.

(3) Non-breaking of 220 acres during the year 1906.

(4) Non-payment of the taxes.

The right of the vendor to forfeiture is the same if all principal and interest, excepting the last dollar, had been paid, on the day stipulated, or if all the breaking excepting the last acre had been done, or if any portion of the taxes remained unpaid. And the question which, to my mind, has to be answered in this case is: Was it the real intention of the parties that under these circumstances the vendor was to have the right to cancel the contract and appropriate to himself all the moneys paid and all improvements made? Was it their real, serious agreement that the purchaser was to forfeit all sums paid and all improvements made if he omitted to pay the taxes for any year? To simply state the proposition is, to my mind, to refute it. I cannot believe that it ever was in the contemplation of the parties that such was to be the effect of this clause.

In Elphinson v. Monkland Iron and Coal Co., 11 App. Cas. 342, Lord Watson lays down a principle which I think applies here. He said: "When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages, the presumption is that the parties intended the sum to be penal and subject to modification."

The conduct of the parties also satisfies me that it was not intended that forfeiture should take place if the stipulations were not performed precisely on the day provided for. The first payment of interest became due on 1st November, 1905, and was not made until 14th November, when it was accepted by the defendant. The contract called for 400 acres of breaking in 1905. The plaintiff broke only 325 acres, and the defendant agreed in November, 1905, to accept $300 as security in lieu of the 75 acres unbroken. This money was not paid until the following February, and the defendant accepted it without question. The local improvement taxes

for 1905 were not paid that year, nor yet in 1906. Neither were the school taxes nor the local improvement taxes for 1906 paid during that year. Not one of the stipulations provided for in the agreement was performed at the time specified, and the defendant raised no objection until 2nd November, 1906, when he cancelled the contract. These considerations lead me to the conclusion that at the time the agreement was signed, the parties did not contemplate that forfeiture would follow if the terms of the agreement were not carried out just on the day specified.

I cannot distinguish this case from In re Dagenham (Thames) Dock Co. There, as here, the agreement contained a clause that time was of the essence thereof. The first payment was made and the purchasers let into possession. Improvements were made on the property. The agreement contained a clause that, if payment was not made on a day specified, the vendors could retake possession of the land and retain all moneys paid. Default was made, but the Courts held that the clause was penal in its nature, and relieved against it.

In the present case I would allow the appeal, with a reference to the local registrar to ascertain the amount due under the contract to the defendant; the plaintiff to have 3 months from the date of the report to pay into Court the amount found to be due. But, if the plaintiff fail to pay the amount so found due into Court, there should be judgment for the defendant with costs. As to the $300, I am satisfied it was paid as security for the non-breaking of the 75 acres. The defendant is, therefore, entitled to hold it until all the breaking provided for in the agreement is done, when it should be applied on the principal.

In addition to what I have said, I might add that I have grave doubts if the parties ever intended clause 7 to be operative at all. The blanks in both clause 7 and clause 8 were not filled in. On the argument it was admitted by counsel for the defendant that the parties never intended clause 8 to be operative, and yet it was left in the agreement. By using the printed form, the only point on which the parties had to agree in clause 7 was the place where notice was to be sent. This they left blank. In view, however, of the conclusions I have arrived at above, it is not necessary that I should consider this point.

YUKON TERRITORY.

CRAIG, J. MARCH 9TH, 1908.

TRIAL.

REX v. MERCIER.

Criminal Law—Keeping Common Bawdy House—Evidence —One Prostitute Resorting to Hotel — Knowledge of Keeper of House—Criminal Code, R. S. C. 1906 ch. 146. sec. 238 (j)—Amendment of 1907—Effect of—Conviction —Penalty—Character of House—Fine.

The defendant was accused, on the information of Allan A. McMillan, a sergeant of the Royal North-West Mounted Police in charge of the town station of Dawson, of being a loose, idle, and disorderly person on 18th February, 1908, and at divers other times for a space of three months previous thereto, and of keeping and maintaining a disorderly house, to wit, a common bawdy house, by keeping and maintaining a certain house known as the "Fourth Avenue Hotel" for purposes of prostitution.

H. S. Tobin, for the Crown.

C. W. C. Tabor, for defendant.

CRAIG, J.:—Under a warrant issued on the application of the sergeant, the house was searched or raided on the night of the 17th and morning of the 18th February last, and upon that raid the following evidence was discovered. About two o'clock in the morning the sergeant, with his staff, went to the house; he found the proprietress, Margaret Mercier, the defendant, on the stairway, and asked for a certain person—a man whom he expected to be there—and he was shewn his room; on arriving at the room he found this man, who opened the door of the room, and, on entering, a recognized and admitted prostitute—Nina Davy —was found in his bed. On further search the sergeant found a room locked which the proprietress said was the room of Louise Misse, who was also a recognized prostitute a short time ago. This door was locked; and the proprietress said she had no key by which she could open it. The husband of the proprietress, Lebault, was found in his own room in bed. The sergeant then proceeded downstairs,

and coming to a door which he found locked, the proprietress said it was an old store room; that no one was there. She had denied previously that any other person was in the house, and that she knew where Louise Misse was. This door was locked, and she said she had no key to it. On the sergeant threatening to open it by force, Louise Misse came to the door. She was in her night dress and over her night dress she had a kind of wrapper. The sergeant gave no evidence as to how she was clothed otherwise. The girl in her evidence says she had on her slippers and stockings. In the room and in bed was found another man. But first I may say that when Louise Misse opened the door and found a sergeant of police at it she slammed the door in his face, and only on another application did she open the door. No other occupants were found in the house except legitimate boarders. Upon the trial the following evidence was given. The man found in the room with Nina Davy says he knew her as a prostitute; that he had met her some time previously and arranged with her to come to this place; that she came there and met him every time he came to town, which was once a week; that this woman had supper with him and others in the house and with the accused; and that the accused must have known for what purpose he occupied the room, and that a prostitute was there with him; that he paid for his room $20 a month. He also admitted that he had and used another room in another hotel, namely, the Principal Hotel, which he said was used as an office. But it appears that in this other room there was also a bed. The evidence of the man found in the room with Louise Misse is that he knew her as a prostitute in what is known as Klondike City, being a suburb of Dawson, in a part of that suburb set apart by a former town council of Dawson as a resort of prostitutes and known and recognized as their resort and habitation; that he had had intercourse with her there as a prostitute in former times; but, having taken a fancy to her, he had asked her to quit that life and find some decent occupation; that in pursuance of that arrangement he sent her $50 in January and more in February, and shortly after she received that money she left the prostitute city and came over to reside in this hotel, where he found her on the occasion in question; that on this occasion he had no intercourse with her, but finding no water in his room and hearing a noise in the hall about two o'clock in the morning he went out and found this girl there in the hall;

that he asked her to bring him a jug of water, which she did, and that she remained in his room talking to him for about ten minutes or thereabouts, and at that very time the police arrived. He says that he intended to and still intends to marry the girl. The evidence of the girl herself is that upon this arrangement being made she left and gave up her house of prostitution in Klondike City and came over and engaged as a domestic servant in this hotel, and that she had no intercourse with this man that night and no intention of having any, but came and brought him the water as he says. The accused gives evidence that, in regard to the girl Misse, she was hired at $30 a month and that she did domestic service, cooking and looking after the rooms and general housework. This is confirmed by the evidence of the other boarders in the house, who found her at just such work. The accused and Louise Misse say that they intended to form a partnership in running the hotel, and that they were out that night to see a lawyer for the purpose of drawing up papers. The accused in her own evidence admits that she was at one time what she calls a sport, or prostitute, carrying on her business of prostitution in Klondike City, where the other prostitutes reside. She changed her name, taking the name of Mercier, when she came out from Paris, and went into that business, and has retained that name ever since, although that is not her name, and although she was last August married to one Lebault, who is now residing in the house with her, and even after marriage continues to use the name of Mercier. In her examination she says she was aware of the character of Nina Davy; that she was also aware of the character of Louise Misse, but that Louise Misse has not been guilty of prostitution in her house, so far as she knows, and not kept there for that purpose; that she rented the room to the man who occupied it with Nina Davy; that she knew that Nina Davy was in the room with him, but that she considered it none of her business to inquire or to care what they were doing; she thought that if she (Nina Davy) went into a room with a man it was perfectly open to her to do so and not an offence for the man to receive a woman in his room. She said she would not rent a room to a woman, being a prostitute, to receive men, but she thought that when a man leased a room and paid for it it was none of her business what he did with the room so long as no disorderly conduct was carried on and no disturbance created, and she practically admitted in her cross-

examination that she would do this again or that she saw no harm in using her rooms in that way.

Both the sergeant in charge of the town station and the officer in charge of the patrol of the city gave evidence that the house had the reputation of being a house of ill-fame.

On behalf of the Crown a witness called Freibourg was called, who seems to be a working man and to go to bed early. He says he saw Nina Davy there once or twice within the last two months, saw Louise Misse there within the last two weeks, saw her doing house work; that he saw nothing wrong in the house. It is admitted that Nina Davy had supper 7 or 8 times in the house, that she frequently met and was in a room with a man whose room she was found in several times during the last 3 months. Another witness was called for the defence, Carl Lilliestierna, who is a chauffeur, and by his own evidence is under considerable financial obligation to the accused Margaret Mercier for board for several months past. He was a most unwilling and unsatisfactory witness. But I think his evidence is more conclusive than the evidence of perhaps any other witness as to the character of the house, from the very fact of his refusing to answer direct questions on cross-examination. When asked as to the character of the house, he says that it is no worse than any other hotel in Dawson. Being pressed as to what he meant, he would not answer. Being asked if he would take his wife there, he equivocated and finally refused to answer. Being asked if he would take his mother or sister there, he treated the matter in the same way, conveying the impression that he certainly would not take them there, but protesting that he saw nothing wrong, although he had seen Nina Davy there frequently at supper before retiring with her paramour.

I am satisfied upon the evidence that Margaret Mercier let her room to the man who occupied it with Nina Davy, knowing that he intended to use it for the purpose of receiving a recognized prostitute in it and staying with that prostitute in the room on these several occasions all night; that she did not receive more than the ordinary rental of the room for the month. There was not any evidence given as to the actual value of the room. It appears that at the time of—I think after—the raid the husband of the accused made some entries in some books of charges against the different boarders; they were all put in on the same day in the same handwriting, and being the only entries which

could be called entries at all of charges against parties occupying rooms, I think this was done to mislead, if possible, the Court in coming to a conclusion. That she derived no direct gain from the use of the room for the purposes of prostitution beyond the $20 rental a month is proved.

As to the case of the girl Misse I am not so sure. It is singular of course that she should be found in the room at the very time when the police made the raid. Her story and that of the man in whose room she was found is not an impossible one, perhaps not improbable. Both the parties pledge their oath to it, and when a man, apparently respectable, says that he has paid the girl money to leave her life of prostitution and get other employment, and when, in pursuance of that, we find the girl leaving the prostitutes' locality and coming into and doing domestic service, and he pledging his oath that he intends to marry her, one must have some respect for his evidence, and I am not disposed to say I do not believe it, and I will give them the benefit of the doubt in that case. It is unfortunate that she should have borne the reputation which she did previously and should have been in the house on this very night and moment in question.

As to the law. Under the authorities I am satisfied that before the amendment of last session a conviction could not have been secured in this case. The charge is laid under sec. 207 of the former Code, sec. 238 of the present Code (R. S. C. 1906 ch. 146): "Every one is a loose, idle or disorderly person or vagrant who . . . (j) is the keeper or inmate of a disorderly house, bawdy house, or house of ill fame, or house for the resort of prostitutes." A bawdy house is now defined, under sec. 225 of R. S. C. ch. 146, as amended by ch. 8, 1907: "A common bawdy house is a house, room, set of rooms, or place of any kind occupied for purposes of prostitution, or occupied or resorted to by one or more persons for such purposes." The last words from "or occupied" are the words added by the amendment of last session. The case of Rex v. Osberg, 1 W. L. R. 121, decided by Richards, J. (Manitoba), holds that "a woman living by herself in a house cannot be convicted of keeping a bawdy house unless other women than herself resort to it for the purpose of acts of prostitution." That followed the case of Singleton v. Ellison, [1895] 1 Q. B. 607; and also the case of Rex v. Young, 14 Man. L. R. 58. In that case it was also held that this section defining a bawdy house

simply defined the nature of the premises which constituted a bawdy house. That decision was also supported by Rex v. Mannix, 10 Can. Crim. Cas. 152. There again it was held that the statutory definition of a common bawdy house, as contained in the Code, is intended merely to define the nature of the premises within which a bawdy house may be kept, and not as stating what acts constitute such keeping. This also confirmed the former ruling that a woman reputed to be a prostitute living alone in a house and receiving men with herself alone and not allowing other women to resort there for a similar purpose, is not guilty of keeping a bawdy house. And this case refers to the Am. & Eng. Encyc. of Law, 2nd ed., vol. 9, p. 518, and also to 14 Cyc. p. 484.

As to the evidence given, there is no doubt as to the authority for giving evidence of the bad repute of the house, but that alone will not justify a conviction. Some evidence of acts in support of the bad repute must be given: see Regina v. McNamara, 20 O. R. 489.

I have already stated what the acts were that were proved. In Archbold's Criminal Evidence, p. 1139, it is said that "if a lodger let her apartments for the purposes of indiscriminate prostitution, it is as much a bawdy house as if she let the whole house, and it is not necessary that there should be evidence of any indecency or disorderly conduct being perceptible from the exterior of the house." It was proved quite clearly that the accused acted as mistress of the house, located the rooms, and received payment for them. In answer to the case for the Crown I have been referred to the cases of Regina v. Barrett, 32 L. J. M. C. 36, and Regina v. Stannard, 33 L. J. M. C. 61. In the first case it was held that "the landlord of the weekly tenant of a house who used it for a brothel cannot be convicted of keeping a brothel, merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit, where he receives no additional rent by reason of its immoral occupation;" and in the second case, "nor would the landlord be liable to be so convicted even if at the time he let the house he knew it was to be used as a brothel, and by reason of its occupation as such received an additional rent." These are very strong cases, but they have been considered in State v. Smith, 7 Criminal Law Magazine 111, the distinction being drawn between the case of State v. Smith and these other cases, that the owner continued to live in her house as mistress of it, and the

women who occupied her rooms being merely boarders or lodgers, she had the power to eject them at any time if they were using her room for the purposes of prostitution. In the case I am considering that is the very point. The accused let one room in her house, which she continued to occupy and use as a general hotel and resort for the public, to which she invited the public as to an ordinary inn where the public go and had a right to expect that the house was decent and of good repute. There was nothing to prevent her from at once, on discovering the nature of the occupation of her rooms and the purposes for which they were intended and used, to cancel the tenancy and turn out the lodger. And I think, if that is the only defence, it must fail. There is no need to consider in this case what constitutes a prostitute, because it is admitted by all parties—by the men who slept in the house, by the mistress of the house—and it is proven by the direct evidence of the police, that she is a prostitute. It remains then only to consider what is the effect of the amendment of last session. By the evidence there is only one woman that I have held is a prostitute now, who resorted to that house for the purposes of prostitution. That was Nina Davy. She went there every time this man came to town, which was once a week for the last two or three months. That was certainly a prostitute resorting. I need not define the term "resorting" more than to say it is a habit of going to a place repeatedly. Even this would not constitute an offence under the old law.

It is argued that some meaning must be given to the word "kept" in the section—"place, room or house kept for purposes of prostitution." I do not think it can be successfully argued that because a person does not keep her whole house for that purpose she cannot keep one or two rooms for that purpose. The case of State v. Smith is in point there, also Rex v. Pearson, 3 Ld. Raym. 1198, 1 Salk. 382; and the notes in The Queen v. Spooner, 4 Can. Crim. Cas. 209: "If a person be only a lodger, and have only one room in a house, and use that room in the way of a bawdy house, that will constitute the keeping of a bawdy house." Beyond doubt, one room was used for the purposes of prostitution. I do not think it is necessary to prove any gain to the prostitute or that money passed at all. The authorities on that point are quite clear—Rex v. James, 7 Can. Crim. Cas. 196, and Rex v. Sala, decided by myself in this Court.

I think the word "keep" means no more than having, keeping open, being responible for the running of, and does not mean the forced meaning endeavoured to be put upon it of holding it out as a prostitution house, or as maintained for that purpose alone. Having the house, exercising authority over it, and allowing it to be used in any way for that purpose, to my mind satisfies the statute in that respect. The section now, I think, simply means this, that it has met the effect of all the authorities which held that one person living alone and receiving men cannot be convicted of keeping a bawdy house, or that by one person resorting to a place it cannot be so held, and, instead of that, the enactment means that a house occupied by one person who receives men and prostitutes herself as a prostitute is a bawdy house, that one person resorting to a house for that purpose, to the knowledge of the owner of the house, constitutes an offence also. It does not alter the law as to isolated acts not constituting prostitution. One or two acts may not be considered an offence under the Act, but where repeated acts are proved, then it is certainly resorted to under the meaning of the section. And I can conceive of no other meaning which the section has than that it is the intention of the legislature that the resorting by one person to a house for the purposes of prostitution constitutes that house a bawdy house, if the owner of it or the keeper of it is aware of what the resorting is for. The knowledge of the accused and the acts are clearly proven, and in this case there is nothing unproven to constitute the offence, and the only answer is that it is a case of one woman resorting with one man who is a tenant. I think that is no answer under the present law, and I must find the accused guilty.

The only question remaining to be considered is the penalty to be imposed. I am surprised that more evidence was not given of the general character of the house, especially after the police asking for a special search. The police were not absolutely definite in giving their evidence as to ill-repute. They pledge their oath that the house had that reputation, but, if the house has that reputation, it is singular that some evidence of questionable characters resorting there was not given, or of disorderly acts or indecent conduct; that some of the neighbours who were disturbed or annoyed or some of the public who were offended by this house did not give evidence. At least some evidence

of men resorting at unreasonable hours might have been expected. No such evidence was tendered, and the police inform me, in spite of an enlargement of one week, that no such evidence could be obtained. The whole evidence before me is confined to the one act or the several acts of the one man and woman. I have already held that that constitutes an offence; but the gist of the offence of keeping a bawdy house is that it is an offence to the public or a public nuisance, offensive to the public, and dangerous to the morals of the community. No evidence of this kind was given, and I am not disposed on that account to impose the severe penalty of imprisonment, particularly as the imprisonment of a woman in this Territory means an enormous expense to the government and the engagement of two matrons, and I do not think the offence warrants me in imprisoning this person. Even apart from that consideration altogether, upon the evidence alone I am entitled, under the authorities, to consider the nature of the offence and the amount of the evidence given in proving a charge of this nature. I think that she will be sufficiently punished by my imposing a fine of $40 and the costs.

YUKON TERRITORY.

CRAIG, J. MARCH 12TH, 1908.

CHAMBERS.

MOORE v. SHACKLEFORD.

Judgment Debtor—Order for Commitment—Arrest—Habeas Corpus—Practice—Finding of Judge after Examination of Debtor on Judgment Summons—Warrant of Commitment—Irregularity—Affidavit.

Motion by defendant for a writ of habeas corpus.

C. W. C. Tabor, for defendant.

R. L. Ashbaugh, for plaintiff.

CRAIG, J.:—The plaintiff recovered judgment against the defendant, and after the return of the writ of execution nulla bona he issued a summons under an Ordinance of this

Territory, being ch. 6 of 1904, "An Ordinance respecting the Collection of Debts." That Ordinance, by sec. 3, provides that "any party having an unsatisfied judgment may procure from the clerk a judgment summons (form No. 1 in the schedule) requiring the debtor to appear, at the time and place therein expressed, to be examined upon oath touching his estate and effects and the manner and circumstances under which he contracted the debt," etc. Examination is to be had in the Judge's Chambers.

Section 8, sub-sec. (c), (i) and (ii), provides as follows: "If it appears to the Judge either by the examination of the party or other evidence (i) that the debt which formed the subject of the judgment was fraudulently contracted, or (ii) that the credit was obtained under false pretences, the Judge may, if he thinks fit, order such party to be committed to the common gaol for any period not exceeding one year." Section 6 provides: "Any person imprisoned under this Ordinance who has satisfied the debt, demand, and liability and the amount due upon the judgment, shall, upon a certificate of such satisfaction signed by the clerk, be discharged from custody." Section 12 provides that "upon the issuing of the judgment summons the action or proceedings shall be proceedings in the Territorial Court, and, subject to the provisions of this Ordinance, the practice and procedure shall be those in force in the Territorial Court." Section 5 provides: "Whenever any order for payment as aforesaid has been made, such order shall be delivered to the sheriff of the Yukon Territory, and such sheriff or the deputy of such sheriff, or any bailiff, constable, or peace officer to whom the said sheriff may hand the said order for execution, shall arrest the person against whom such order has issued and convey him to a common gaol, and every gaoler or keeper of such gaol shall receive and keep the person so arrested until discharged under the provisions of this Ordinance or otherwise by due course of law."

In moving for the writ of habeas corpus herein it is urged on behalf of the prisoner that the Court has no jurisdiction, and an affidavit is read which sets out that the solicitor of the prisoner found no order issued subsequent to the judgment summons and prior to the order of commitment, the point taken being that there should have been an order or judgment setting out the finding of the Court upon the return of the judgment summons, and, after the examination and upon that order, some warrant of commitment

should have issued directed to the sheriff upon which the man should have been taken. And under sec. 12 of this Ordinance, which provides for the Territorial Court Rules being in force, I am referred to Rule 329, which provides that "every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, namely: 'If you, the within named A.B., neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment or order.'" And sec. 326 provides: "Except where otherwise provided, every order or decree and every other judgment that the Judge so directs shall be entered by the proper officer at length in a book to be kept for such purpose, properly indexed, and a copy of such entry, certified by the proper officer under the seal of the Court, shall be received for all purposes as of the same force and effect as such order, decree, or judgment."

Referring to Rule 329, which is the same as the English Rule 573, it will be observed that that Rule provides for cases where the order directs something to be done; but the order in this case did not direct anything to be done. It did not direct the payment of the money by the defendant. It was an order for his commitment direct. It was, in fact, as the record shews, held for one month, not to be taken out. That was on the request of the defendant to enable him to pay up, so that he might come within the provisions of sec. 6 above given.

As to the necessity for service and indorsement of the notice upon orders of this nature, I would refer to the authorities cited in Snow & Burney under the English Rule. I, therefore, do not think that this order required to be served with the memorandum mentioned, nor do I think that it should have been enrolled under sec. 326. No directions were given for enrollment. The order was filed in the ordinary course.

Then, again, I think that it cannot be contended that any warrant of commitment should have issued upon the order. The Ordinance provides for a judgment summons

and examination and an order of the Judge. Now, that order is the only writ or warrant provided for, and the Ordinance enacts that that order, and no other paper, shall be given to the sheriff and shall be his warrant for the arrest. It goes so far as to provide that the very order shall be delivered to the sheriff and that the sheriff, acting by deputy or bailiff, may "hand the said order" to the bailiff. So that I think that the argument based upon the right to a warrant of commitment based upon the order must fail. No doubt, the provision was to facilitate the collection of debts in a simple and inexpensive manner, and not to burden the practice with too much machinery.

It is argued that the affidavit should not have been received to shew the irregularity of the proceedings. I think, under the authority of Re Sproule, 12 S. C. R. 158, and of Paley on Convictions, pp. 343, 346, and 354, that affidavits may be read upon a motion of this nature to shew want of jurisdiction, but not to affect or question the accuracy of the finding upon the merits. I also think, under the authorities, that a motion of this kind for a writ of habeas corpus cannot be used or should not be used by way of appeal, nor should it be used when the objections are merely to a matter of process, and I would refer to the cases of Re Sproule, 12 S. C. R. 158; Anderson v. Vanstone, 16 P. R. 243; Re Munn, 25 U. C. R. 24. I think the proceedings were regular, and, even if I were to consider upon the affidavits the process adopted, I would say that the process is the one provided for by the Ordinance, and all things have been done to entitle the sheriff to take the defendant.

It is further objected that the order of commitment does not provide for the release of the defendant, under sec. 6 of the Ordinance, but I do not think that that is necessary. The statute provides how he may be released, and it would seem to me to be unnecessary to embody in the order of commitment a provision of the statute which the defendant is absolutely entitled to take the benefit of upon compliance with it. The same practice prevails as to the issue of an order without a subsequent warrant in our capias proceedings in this Territory. There the order of the Judge upon the affidavit of the applicant is the warrant acted upon by the sheriff without any other writ or warrant.

I therefore refuse the motion for the writ.

YUKON TERRITORY.

CRAIG, J. MARCH 23RD, 1908.

TRIAL.

REX v. MISSE.

Criminal Law—Bawdy House—Inmate or Frequenter—Evidence.

Trial of defendant upon a charge of being an inmate or frequenter of a bawdy house, being the house kept by Margaret Mercier and described in Rex v. Mercier, ante 922.

H. S. Tobin, for the Crown.

C. W. C. Tabor, for defendant.

CRAIG, J.:—On the hearing of this case the evidence given on the former trial of Margaret Mercier was by consent read as evidence, pro and con, in this case. The only additional evidence given was the evidence of Sergeant McMillan, who testified what he forgot to testify on the former occasion, namely, that, on entering the room where Misse was with the man, he found the blankets at the back of the bed turned over as if some one had got out of the bed, and an impression on the pillow and on the bed as if some one had been lying there. There was also the evidence that Misse's hair was up as for the street, not down as on retiring. It will be remembered that in the former case I considered fully, without this last evidence, the story with regard to this girl and gave her the benefit of the doubt. The question is whether I should now, with the additional evidence, alter the opinion which I then expressed. Richardson swears positively that the girl was not in bed with him, and, as I said before, but for his evidence that he had taken the girl out of a house of prostitution and was paying her money to live a different life with the intention of marrying her, I would not have believed their story. While suspicion is very strong against them, yet one must not convict on suspicion, and I must be satisfied beyond reasonable doubt as a jury that this charge is proven.

It is argued that the girl by her presence in the house, which has been found to be a bawdy house, convicts herself. But, on the other hand, it can be said in reply that the girl, with her previous character, had nowhere else to go; respectable homes were closed to her, and only such a house

as this, which, it appears now, had a shady reputation, could she have gone to. That she went there as a domestic servant I held in the former case. To find her guilty I should have to totally disbelieve the evidence of the respectable boarders in the house, of Richardson, of the girl herself, and her employers, and rely solely upon the one circumstance of her being found in the room at that hour of the night. That would be sufficient, however, to warrant me in convicting, were it not for the fact that Richardson has sworn that he and the girl were engaged to be married, that he intends to marry her, and that she left her business of prostitution for the purpose of changing her life. Surely a person can do that! Surely it is possible for a woman to abandon a life of prostitution and become decently married! And if I am satisfied that that was the intention of the parties, then I am not justified in throwing her back again to her former life if by any possibility it can be escaped. If she is innocent, I should be doing her a greater injustice and wrong and injury by convicting her than any injury I should be doing to the public by allowing her to escape if she is guilty. And that consideration weighs very largely with me in forming my judgment. I believe the story which they tell of the engagement of marriage and her intention to abandon that life, because she did leave a cabin which she occupied in Klondike City.

Then, again, she is charged with being a frequenter under sub-sec. (k) of sec. 238; whereas, if she is anything at all, she is an inmate under sub-sec. (j). It is true that I have found, and it was proven in the former trial, that the house she was in is a bawdy house; but it is not what would be called a bawdy house under the law previous to the amendment of last session, nor would it be called a bawdy house at common law. It was held to be a bawdy house technically because it satisfied the description contained in the amended sec. 225, because it was resorted to by a prostitute, or that frequent assignations were made by a prostitute and one lodger in the house, that being the only act which I found proven. It was also proven to be an hotel where apparently respectable people resorted as to an ordinary inn. So that, therefore, it cannot be called a bawdy house in the general acceptation of that term, and no evidence was given to satisfy me that the girl Misse was kept in that house or that she lived there for the purposes of prostitution except the one fact that she was found in this room which I in the former case decided was explained away

by the evidence that she intended to marry this man and was there accidentally.

Again, as a matter of law, if she has abandoned a life of prostitution and was engaged to this man, to be married to him, and even supposing she did lie in the bed with him that night, could that be held to be an offence punishable at law? It has been held that a woman kept by a married man and surrendering herself to him alone does not come within the purview of this section, and cannot be convicted of keeping a bawdy house or being a prostitute—Regina v. Rede, 1 Can. Crim. Cas. 63. And even under the present law one act of intercourse or prostitution would not warrant a conviction. The difficulty in this case is that the woman was formerly a prostitute; but, if she was, and now abandons herself to one man only whom she is about to marry, can it be held that she frequents a bawdy house for purposes of prostitution? She cannot be convicted of being a frequenter, as the charge is laid, as I have said; she is, if anything, an inmate. But she must be found to be an inmate for the purpose of prostitution. She might be an innocent inmate. If I found that she did lie with the man who was her intended husband, that one night in that house, would I then be justified, as a matter of law, in finding her an inmate in the sense of being kept there for general prostitution? There is no evidence of that fact, but suspicion drawn from the facts set out in this and the former judgment; and if I believe, as I do, the story of the intended marriage, can I hold the girl to be an inmate of a house of prostitution, in the legal and proper acceptation of that term, even if I amend the information to meet this view of the case? I think not.

I may be wrong in the judgment that I am forming, and I may be imposed upon by these people, but I think there is more danger in my finding the girl guilty than in finding her innocent; that in this case if they are telling the truth about the engagement of marriage and honestly living up to the engagement, as they swear—and I have no reason to doubt Richardson's word, an apparently respectable man—I should be doing a great wrong if I found her guilty of being a prostitute now; and for that reason I do not consider the charge proven satisfactorily to me, and I adjudge her not guilty.

This judgment should be read with the former one in the case of Rex v. Mercier.

WESTERN LAW REPORTER

CANADA

INDEX-DIGEST TO VOLUME VII. (NOVEMBER-APRIL, 1908).

ABSCONDING DEBTORS.

See Attachment of Goods.

ACCELERATION.

See Mortgage, 1—Promissory Notes, 5—Vendor and Purchaser, 5.

ACCORD AND SATISFACTION.

See Company, 9.

ACCOUNT.

See Banks and Banking, 2—Executors—Partnership, 1, 2.

ADMINISTRATOR.

See Gift.

ADMINISTRATOR AD LITEM.

See Assessment and Taxes, 4.

ADMISSIONS.

See Criminal Law, 10, 13—Pleading, 6.

ADULTERATION ACT.

See Constitutional Law, 1.

ADULTERY.

See Husband and Wife, 1.

AFFIDAVITS.

See Attachment of Debts, 3—Chattel Mortgage, 2—Judgment, 1, 2, 10—Judgment Debtor—Practice, 1, 4.

AGENT.

See Principal and Agent.

AGISTMENT.

See Contract, 5.

ALBERTA ASSIGNMENTS ACT.

See Bankruptcy and Insolvency, 2.

ALIMONY.

See Husband and Wife, 1, 2, 3.

AMENDMENT.

See Assessment and Taxes, 4—Chose in Action, Assignment of, 1—Contract, 3—Criminal Law, 14—Defamation, 2—Fraud and Misrepresentation, 2, 3—Judgment, 6, 8—Pleading, 5, 6—Promissory Notes, 6.

ANIMALS.

See Contract, 5—Railway, 2, 3, 4, 8.

APOLOGY.

See Contempt of Court.

APPEAL.

1. To Supreme Court of British Columbia—County Court Appeal—Time—Pronouncing of Judgment—Issue of Formal Judgment: Kirkland v. Brown (B.C.), 786.

2. To Supreme Court of British Columbia — Water Clauses Consolidation Act, 1897, secs. 36, 39—"Decision"—Time for Taking Appeal—Interlocutory Appeal—Jurisdiction: Bole v. Roe (B.C.), 160.

See Criminal Law, 1—Judgment, 5—Mines and Minerals, 1—Payment out of Court, 2—Practice, 3—Principal and Agent, 14—Railway, 1, 6.

ARBITRATION AND AWARD.

1. Arbitrators Failing to Agree — No Award Made — Lapse of Time for Making — Failure to Extend—Arbitrator Functus Officio — Winnipeg

City Charter—Claim for Compensation for Injury to Land—Notice to Appoint Arbitrator — City Corporation — Non-compliance—Application to County Court Judge — Prohibition: Re Bennetto and City of Winnipeg (Man.), 561.

2. Motion to Enforce Award — Submission—Matters in Difference—Jurisdiction of Arbitrators — Waiver—Acceptance of Award Made after Time Expired—Failure of Arbitrators to Enlarge Time: Re Morrow and Lindsay (Sask), 48.

3. Workmen's Compensation Act—Case Stated by Arbitrator — Refusal to Consider—Reference back to Arbitrator—Jurisdiction of Judge of Supreme Court—Proper Form of Case —Questions of Law: Re Armstrong and St. Eugene Consolidated Mining Co. (B.C.), 374.

See Railway, 6, 7.

ARCHITECT.

Preparation of Plans and Estimates — Remuneration for—Liability of Defendant — Contract — Evidence — Conduct of Parties—Useless Work—Costs: Lachance v. Wilson, (Sask.), 646.

See Building Contract, 1.

ARREST.

See Criminal Law—Judgment Debtor.

ASSESSMENT AND TAXES.

1. Special Frontage Assessment—Local Improvement — Half Lots Abutting on Street — Irregularity of Assessment—Construction of Special Act Incorporating City: Re Brotherton and City of Medicine Hat (Alta.), 187.

2. School Taxes — Assessment Made before Commencement of Year—Invalidity—Change of Ownership—Taxes Paid under Protest—Recovery—Interest: Braatz v. White Whale Lake School District No. 746 (Alta.), 164.

3. Tax Sale — City Corporation Becoming Purchaser — Agreement for Redemption — Resolution of Council—Specific Performance—Tender—Estoppel—Waiver of Forfeiture—Acts of Officers of Municipal Corporation —Notices—Court of Revision—Title —Real Property Act—Trust: Ponton v. City of Winnipeg (Man.), 702.

4. Tax Sale — Confirmation—Time for Redemption — Statutes — Retroactivity — Amendment—Administrator ad Litem — Costs: Re Baker (Sask.), 69.

See Municipal Elections.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Bankruptcy and Insolvency.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action, Assignment of.

ASSIGNMENT OF CONTRACT.

See Vendor and Purchaser, 3, 6, 12.

ASSIZE OF BREAD.

See Municipal Corporations, 1.

ATTACHMENT OF DEBTS.

1. Garnishing Summons before Judgment —Nature of Plaintiff's Claim—Rule 384—" Debt or Liquidated Demand " —Claim for Necessaries Supplied to Defendant's Wife and Daughter: Parkin v. Parkin (Sask.), 66.

2. Money Paid into Court by Garnishees —Payment out to Sheriff for Distribution under Creditors' Relief Act—Equality among Execution Creditors —Garnishing Creditors before Judgment—Costs: Robert Ward & Co. Limited v. Wilson (B.C.), 37.

3. Practice—Garnishee Summons—Affidavit to Lead—Date of Making—Information and Belief—Grounds of—No Necessity for Stating—Rule 384: Addison v. Dickson (Alta.), 291.

See Builders and Workmen's Act—Practice, 5.

ATTACHMENT OF GOODS.

Absconding Debtors—Action for Money Demand — Jurisdiction of Court—Cause of Action — Foreigners—Domicile—Rules 201, 202—Tort—Conversion of Money abroad—Detention in Manitoba — Contract—Motion to Set aside Order of Attachment—Extension of Time for Moving—Order to Set aside—Order for Detention of Goods pending Trial—Rule 894—Goods the Subject of Action—Claim to Specific Chattels — Terms and Conditions — Stay of Proceedings: Emperor of Russia v. Prospouriakoff (Man.), 766.

AUCTION.

See Execution, 3.

AWARD.

See Arbitration and Award.

BAILMENT.

Innkeeper—Lost Luggage — Liability—Authority of Clerk or Manager: Delagorgendiere v. Acaster (Sask), 467.

BANKRUPTCY AND INSOLVENCY.

1. Assignment for Benefit of Creditors—Agreement of Creditor to Postpone Claim in Order that Business of Insolvent Might be Carried on—Construction of Agreement — Right of Creditor to Rank with Others in Distribution of Assets — Receiver: Fowler v. Barnard, Re Barnard (Alta.), 624.

2. Distribution of Insolvent's Estate—Lien of Execution Creditors—Alberta Assignments Act, 1907, sec. 8—Retroactivity — Preference — Executions Delivered to Sheriff — Costs: Deering v. Gibbon (Alta), 178.

See Company—Fraudulent Conveyance—Husband and Wife, 4, 5, 6—Payment out of Court, 2.

BANKS AND BANKING.

1. Cheque of Customer—Presentment to Clerk in Bank—Direction to Present to another Clerk Interpreted as Refusal to Pay—Action for Damages for Refusal to Cash Cheque—Evidence for Jury—Admission of Presentment — Inference from Conduct—Waiver: Rear v. Imperial Bank of Canada (B.C.), 408.

2. Collateral Security Deposited with Bank to Secure Payment of Promissory Notes and Advances — Memorandum of Hypothecation—Judgment—Settlement — Account — Fiduciary Relationship — Trustees — Breach of Trust—Failure to Exercise Due Diligence in Realizing Securities — Bona Fides — Tender of Reconveyance — Laches — Interest—Rate of—Overpayment — Illegal Rate — Contract — Pass-book—Estoppel—Parties—Costs: Barrette v. Canadian Bank of Commerce and Syndicate Lyonnais du Klondike (Y.T.), 659.

BAWDY HOUSE.

See Criminal Law, 4, 5.

BILL OF SALE.

Extension of Time for Registration—R. S. B. C. 1897 ch. 32, sec. 10—Omission to Register in Time—Inadvertence—Order Extending Time—Terms—Protection of Intervening Rights: Re W. P. Ellis & Co. (B.C.), 371.

See Chattel Mortgage—Sale of Goods, 7—Will, 2.

BILLS AND NOTES.

See Banks and Banking—Cheque—Promissory Notes.

BOARD OF RAILWAY COMMISSIONERS.

See Railway, 1, 9.

BOND.

See Criminal Law, 8.

BONUS.

See Master and Servant, 2—Municipal Corporations, 7.

BREAD.

See Municipal Corporations, 1.

BRITISH COLUMBIA HEALTH ACT.

See Constitutional Law, 1.

BRITISH COLUMBIA IMMIGRATION Act.

See Constitutional Law, 2.

BUILDERS AND WORKMEN'S ACT.

Lien of "Workmen" for Wages—Employment "by the Day," under sec. 3—Attachment of Debts—Judgment Creditor — Claimants — Priorities: Dunn v. Sedziak (Man.), 563.

BUILDING.

See Highway—Mechanics' Liens—Municipal Corporations, 3—Trespass, 2.

BUILDING CONTRACT.

1. Action for Balance of Contract Price—Satisfaction of Architect—Certificate—Refusal of—Fraud and Collusion — Construction of Contract—Condition Precedent — Waiver—Acceptance of Work — New Contract for Extra Work—Counterclaim—Delay in Completion of Building—Loss of Profits—Remedying Defects—Evidence—Mechanic's Lien—Costs: Cyr v. O'Flynn (Sask.), 452.

2. Action for Contract Price—Authority of Owner for Extra Work—Performance of Contract — Specifications—Completion of Work—Material Variations and Omissions—Acceptance—Taking Possession of Building—Offer to Pay Rent — Mechanics' Liens—Judgment for Enforcement: Broley v. Mills (Sask.), 655.

3. Failure of Contractor to do Work within Time Agreed—Owner Stopping Work on Building — Express Promise to Pay for Work Done—Consideration — Benefit—Counterclaim — Damages: Vogan v. Barry (Sask.), 811.

See Mechanics' Liens.

BY-LAWS.

See Cheque — Company, 3—Liquor License Act—Municipal Corporations—Pleading, 6—Railway, 1—Trespass, 1.

CANADA SHIPPING ACT.

See Ship, 2.

CANCELLATION.

See Fraud and Misrepresentation—Vendor and Purchaser.

CARNAL KNOWLEDGE OF CHILD.

See Criminal Law, 3.

CAVEAT.

See Land Titles Act, 2—Vendor and Purchaser, 14.

CAVEAT EMPTOR.

See Vendor and Purchaser, 2.

CERTIFICATE OF TITLE.

See Land Titles Act, 5—Mortgage, 3.

CHATTEL MORTGAGE.

1. Default in Payment—Seizure of Chattels—Collusive Sale — Damages—Interest: Grimes v. Gauthier (Sask.), 485.

2. Validity — Bills of Sale Ordinance—Advances to Mortgagor to Enable him to Carry on Business—Period of Liability — Computation of Years—Agreement for Advances—Recital—Estoppel — Company — Affidavit of Bona Fides—Vice-President—Agent —Extent of Liability — Price of Goods Supplied—Promissory Notes: Newlands v. Higgins (Alta.), 59.

See Bill of Sale—Mortgage, 2—Sale of Goods, 7.

CHEQUE.

Action on Dishonoured Cheque—Illegal Consideration—Agent's Commission on Sale of Land—Real Estate Agent — Municipal By-law Requiring License—Revenue By-law — Recovery of Commission notwithstanding Want of License—Settlement — Estoppel: Horner v. Stevenson (Alta.), 794.

See Banks and Banking, 1 — Miners' Liens.

CHOSE IN ACTION, ASSIGNMENT OF.

1. Action by Assignee—Failure to Give Notice to Defendant — Pleading—Evidence — Amendment—Statute of Limitations—Partnership: Reynolds v. McPhalen (B.C.), 380.

2. Order for Payment of Money—Validity as Assignment — Signature of Assignor — Assignment of Future Debts, Validity of—Previous Assignment — Priority — Notice—Judicature Ordinance — Interpleader — Costs: Re Miller and American-Abell Engine and Thresher Co. and Webster (Sask.), 839.

CIVIL SERVANT.

See Municipal Elections.

COLLATERAL SECURITIES.

See Banks and Banking, 2—Principal and Agent, 12—Promissory Notes, 1.

COLLISION.

See Ship, 2.

COMMISSION.

See Cheque—Principal and Agent.

COMMITTEE.

See Lunatic.

COMMON BAWDY HOUSE.

See Criminal Law, 4, 5.

COMMON GAMING HOUSE.

See Criminal Law, 6, 7—Trespass, 1.

COMPANY.

1. Extra-provincial Corporation — Non-registration—Carrying on Business—Goods Forwarded to Agent for Sale—Promissory Notes Given for Price—Principal and Agent—Statute Penalizing the Carrying on of Business by Non-registered Companies—Effect on Contracts: De Laval Separator Co. v. Walworth (B.C.), 395.

2. Extra-provincial Corporation — Non-registration—Carrying on Business—Companies Act, sec. 123—Construction—Prohibitive Enactment—Action on Contract: North-Western Construction Co. v. Young (B.C.), 397.

3. Lien on Shares for Indebtedness of Shareholder to Company—Seizure of Shares by Sheriff under Execution against Shareholder—Claim of Lien by Company—By-laws of Company Creating Lien—Power of Company to Make—Manitoba Joint Stock Companies Act — Existence of Debt to Company—Promissory Note—Liability — Extinguishment — Waiver by Discounting Note: Montgomery v. Mitchell (Man.), 518.

4. Moneys Paid to Executors of Deceased President — Secret Trust—Action to Divert Moneys into Treasury of Company—Status of Plaintiff as Shareholder and Creditor—Parties—Company not before Court—Leave to Add in Master's Office—Distribution or Moneys—Reference—Practical Winding-up: Jenns v. Oppenheimer (B.C.), 774.

5. Shares — Allotment — Calls — Liability of Subscribers—Estoppel—Notice — Directors — Irregularities in Election — Unqualified Persons Elected and Acting — Quorum of Qualified Directors — Validity of Calls: Morden Woollen Mills Co. v. Heckles (Man.), 715.

6. Shares — Sale — Delivery — Promissory Note for Price—Action on — Allotment of Shares: Anglo-American Lumber Co. v. McLellan (B.C.), 422.

7. Shares — Sale — Duty of Vendor—Transfer—Necessity to Procure Registration—Failure of Consideration—Articles of Company: Castleman v. Waghorn (B.C.), 412.

8. Winding-up—Claim for Repossession of Goods Sold to Company under Conditional Contract—Contract Purporting to be Made before Incorporation—Time of Execution—Contract Binding on Company—Acceptance of Goods—Giving Promissory Notes for Price—Purchase of Goods Required in Business — Power to Contract without Seal — Judgment against Company for Price—Estoppel—Fixtures—Failure to Register Contract: Re Red Deer Mill and Elevator Co., Stratford Mill Building Co.'s Claim (Alta.), 284.

9. Winding-up — Contributories — Subscriptions for Shares — Agreement with Company for Issue of Paid-up Shares — Consideration—Accord and Satisfaction — Invalidity of Agreement—Ultra Vires: Re Jones and Moore Electric Co. of Manitoba (Man.), 527.

10. Winding-up — Seizure of Goods of Company under Execution after Notice of Presentation of Petition Served—Lien of Execution Creditor—Winding-up Act—Change in Wording by R. S. C. 1906—Effect of: Re Ideal Furnishing Co., Stewart-McDonald Co.'s Case (Man.), 558.

See Chattel Mortgage, 2 — Municipal Corporations, 7 — Practice, 2—Promissory Notes, 1—Vendor and Purchaser, 15.

COMPENSATION.

See Arbitration and Award, 1—Railway, 6, 7.

COMPROMISE.

See Settlement of Action.

CONFESSION.

See Criminal Law, 10.

CONSOLIDATION OF ACTIONS.

See Mechanics' Liens, 1.

CONSPIRACY.

See Criminal Law, 2.

CONSTITUTIONAL LAW.

1. British Columbia Health Act—Regulations Issued by Lieutenant-Governor in Council—Standard of Quality of Milk—Ultra Vires—Field Occupied by Federal Legislation—Dominion Adulteration Act: Rex v. Garvin (B.C.), 783.

2. British Columbia Immigration Act, 1908—Ultra Vires—B. N. A. Act, sec. 95—Legislative Field Occupied by Dominion Legislation: Rex v. Narian (B.C.), 781.

3. Vancouver Island Settlers' Rights Act, 1904—Intra Vires—Crown—Provincial Government—Grant of Land—Validity — Grand of Minerals and Timber by Dominion Government—Locus Standi of Plaintiffs to Attack Grant to Defendant—Absence of Assent by Crown—Costs — Defendant Indemnified against Costs: Esquimalt and Nanaimo R. W. Co. v. Fiddick (B.C.), 778.

See Land Titles Act, 1.

CONTEMPT OF COURT.

Committal of Defendant for Non-production of Book—Application for Discharge — Destruction of Book — Apology—Purging Contempt — Payment of Costs: Cotter v. Osborne (Man.), 90.

CONTRACT.

1. Breach — Damages — Supply of Coal —Construction of Clause of Contract —Penalty or Liquidated Damages—Failure to Prove Actual Damage: Brock v. Royal Lumber Co. (Man.), 247.

2. Breach—Delivery of Lumber—Orders for Lumber — Acceptance — Correspondence—Evidence—Failure to Deliver Part—Damages: Watts & Co. v. Mohler (Alta.), 627.

3. Elevators Supplied for Building—Destruction by Fire before Completion —Fire Caused by Imperfections in Electric Work—Acceptance of Elevators by Insuring and Receiving Insurance Moneys — Counterclaim for amount of Loss—Amendment—Construction of Contract — "Machine" —Quantum Meruit—Defects—Negligence—Entire Contract—Interest—Pleading — Prayer for General Relief: Fensom v. Bulman (Man.), 134.

4. Sale of Mining Claims—Condition—Non-fulfilment — Failure of Action for Price: Myers v. Tytler (B.C.), 416.

5. Wintering Cattle—Terms of Contract —Redelivery — Evidence — Corroboration—Damages for Detention—Counterclaim: Still v. Watson (Sask.), 466.

6. Work and Labour—Tender—Specifications—"Estimate or Certificate" of Engineer of Municipal Corporation —Construction of Contract—Costs: Fry v. Town of Indian Head (Sask.), 293.

See Architect—Assessment and Taxes, 3—Banks and Banking, 2—Building Contract—Chattel Mortgage—Company, 1, 2, 8, 9—Costs, 2—Covenant—Fraud and Misrepresentation —Judgment, 9—Landlord and Tenant — Master and Servant — Mechanics' Liens — Partnership, 1—Principal and Agent — Promissory Notes—Railway, 1, 5—Sale of Goods —Ship, 1—Vendor and Purchaser—Writ of Summons.

CONTRIBUTION.

Co-sureties—Makers of Promissory Note for Accommodation of Third Person — Question of Fact — Finding of Trial Judge — Defendant Guarantor for Plaintiff, and Note Paid by Plaintiff — Right to Contribution from Defendant: Grobb v. Darling (Man.), 97.

CONTRIBUTORIES.

See Company, 9.

CONTRIBUTORY NEGLIGENCE.

See Highway.

CONTROVERTED ELECTION PETITION.

See Parliamentary Elections.

CONVERSION.

See Attachment of Goods.

CONVICTION.

See Criminal Law—Municipal Corporations, 3.

COSTS.

1. Action for Money Demand—Recovery of Small Part of Amount Claimed—General Costs—Witness Fees: Vopni v. Stephenson (Man.), 753.

2. Damages — Action for Specific Performance of Contract for Sale of Land—Sale by Defendant to Another —Contract by Plaintiff to Sell to Another—Costs Recoverable as Damages — Quantum of Costs — Fulfilment of Contract after Action Brought: Hill v. Barwis (Alta.), 428.

3. Mechanics' Liens—Extension of Time for Payment by Terms of Contract —Action Begun before Expiry of Extended Time—Costs Incurred in Service of Process — Alberta Mechanics' Lien Act, sec. 7—Provision of sec. 17 as to Posting of Pay Roll —Non-compliance with: Speers v. McAfee (Alta.), 275.

4. Mortgage — Foreclosure — Unnecessary Party — Prior Incumbrancer: Union Trust Co. v. Duplat (Sask.), 459.

5. Scale of Costs—Payment into Court—Amount Recovered by Plaintiff beyond that Paid into Court: Johansen v. Elliott (B.C.), 785.

6. Scale of Costs—Tender before Action —Payment into Court—Recovery of $20 more than Sum Paid in—"Recovered:" McLean v. Dove (B.C.), 365.

7. Taxation—Increased Counsel Fees—Trial of Actions—Discretion—Principles Governing — Practice in Applying to Judge for Fiat: Bryce v. Canadian Pacific R. W. Co. (B.C.), 143.

See Architect—Assessment and Taxes, 4—Attachment of Debts, 2—Bankruptcy and Insolvency, 2 — Banks and Banking, 2—Building Contract, 1—Chose in Action, Assignment of, 2—Constitutional Law, 3—Contempt of Court — Contract, 6 — Criminal Law, 14—Defamation, 1—Discovery, 1—Dominion Lands Act—Ejectment —Fraud and Misrepresentation, 2, 6 —Husband and Wife, 6—Judgment, 1, 4—Mechanics' Liens, 3 — Mortgage, 1—Payment out of Court, 1—Practice, 5—Promissory Notes, 6—Replevin — Sale of Goods, 1, 5—Ship, 1—Vendor and Purchaser, 3.

CO-SURETIES.

See Contribution.

COUNSEL FEES.

See Costs, 7—Mechanics' Liens, 3.

COUNTERCLAIM.

See Building Contract, 1, 3—Contract, 3, 5—Principal and Agent, 3—Promissory Notes, 6—Sale of Goods, 1 3—Vendor and Purchaser, 9.

COUNTY COURT APPEAL.

See Appeal, 1.

COUNTY COURT JUDGE.

See Arbitration and Award, 1.

COUNTY COURTS.

See Fraud and Misrepresentation, 4.

COURT OF REVISION.

See Assessment and Taxes, 3.

COURTS.

See District Court — Divorce—Fraud and Misrepresentation, 4.

COVENANT.

1. Restraint of Trade—Sale of Business —Agreement of Vendor not to Enter into Competing Business — Absence of Consideration — Agreement Made after Completion of Sale: Mund v. Busch (Sask.), 305.

2. Restraint of Trade—Sale of Goodwill of Business — Informal Document—Admissibility of Parol Evidence to Supplement—Operation of Covenant —Time and Place — Assignment of Covenant — Parties — Injunction—Damages: Novak v. Abrahams (Y. T.), 222.

3. Transfer of Land — Restriction as to Carrying on Business of Selling Intoxicating Liquors — Violation—Injunction — Agreement for Sale — Merger in Transfer — Transfer not Executed by Covenantor — Acceptance and Registration — Voluntary Covenant — Specific Performance—Restraint of Trade—Public Policy—Plaintiffs Waiving Covenants in Similar Cases — Laches—Interest of Plaintiffs in Performance of Covenant: International Coal and Coke Co. v. Trelle (Alta.), 264.

See Judgment, 9—Mortgage, 1, 3—Partnership, 2.

CREDITORS.

See Bankruptcy and Insolvency, 1—Company—Fraudulent Conveyance—Husband and Wife, 4, 5, 6.

CREDITORS' RELIEF ACT.

See Attachment of Debts, 2.

CRIMINAL LAW.

1. Appeal from Order of Magistrate — Filing of Order Appealed against — Time — Condition Precedent—Criminal Code, sec. 757: Rex v. Williamson (Sask.), 490.

2. Conspiracy — Trade Combination — Criminal Code, sec. 498 — Construction — "Undue" Restraint — Conditions Governing Grain Trade of the West—Grain Dealers' Associations — By-laws, Regulations, and Agreements—Restraint of Trade — Regulation of Prices — Pooling Receipts — Commission Rule — Evidence—Crown Case Reserved: Rex v. Gage (Man.), 564.

3. Information for Carnal Knowledge of Child—Summary Trial by Police Magistrate — Election — Conviction for Lesser Offence—Jurisdiction — Evidence — Place of Offence — Habeas Corpus: Rex v. McEwen (Man.), 364.

4. Keeping Common Bawdy House — Evidence—One Prostitute Resorting to Hotel—Knowledge of Keeper of House — Criminal Code, R. S. C. 1906 ch. 146, sec. 238 (j)—Amendment of 1907—Effect of—Conviction —Penalty—Character of House — Fine: Rex v. Mercier (Y. T.), 922.

5. Keeping Common Bawdy House—Inmate or Frequenter—Evidence: Rex v. Misse (Y. T.), 934.

6. Keeping Common Gaming House — "Gain" — Payment for Refreshments—"Rake-off — Profit — Gambling—Keeper of House—Players at Game—Onlookers: Rex v. Sala (Y. T.), 336.

7. Keeping Common Gaming House — Jurisdiction of Police Magistrate — Summary Trial without Consent — Criminal Code, sec. 774—Disorderly House — Gaming House: Rex v. Four Chinamen (B.C.), 146.

8. Lottery — Foreign Bond — Evidence to Justify Conviction: Rex v. Picard (Man.), 241.

9. Manslaughter—Peace Officer Shooting Man whom he was Endeavouring to Arrest without a Warrant — Reasonable and Probable Cause — Question for Jury — Directions to Jury—Intention to Wound in Order to Prevent Escape — Accidental Killing: Rex v. Smith (Man.), 92.

10. Murder — Evidence — Confession Obtained by Trick—Admissibility — Prisoner Deluded into Belief that he was Speaking to Agent of Solicitor —Other Persons Present Unknown to Prisoner—Privilege: Rex v. Choney (Man.), 537.

11. Rape—Evidence of Penetration — Sufficiency—Evidence of Complaints made by Prosecutrix — Answers to Leading Questions—Inadmissibility —New Trial: Rex v. Dunning (Sask.), 857.

12. Selling Liquor to Indian — Conviction—Jurisdiction of Indian Agent —Indian Act — Warrant of Commitment not Shewing Jurisdiction —Habeas Corpus — Discharge: Rex v. McHugh (B. C.), 252.

13. Summary Trial of Prisoner on Charge of Theft — Sentence Imposed by Police Magistrate—Admission by Letters before Magistrate—Sentence Based on Fact of Previous Conviction—Reduction by Court of Appeal—Criminal Code: Rex v. Edwards (Man.), 1.

14. Vagrant — Summary Conviction — Illegal Costs—Power of Amendment —Omission to Provide for Costs of Commitment and Conveying to Gaol —Conviction for two Offences — Creating a Disturbance in the Street —Loitering in the Street—Criminal Code, sec. 238—Necessity for Specifying Particular Offence: Rex v. Code (Sask.), 814.

See Indian—Municipal Corporations, 1. 3—Trespass, 1.

CROPS.

See Mortgage, 2 — Vendor and Purchaser, 3.

CROWN.

See Constitutional Law, 3—Dominion Lands Act—Railway, 1.

CROWN CASE RESERVED.

See Criminal Law, 2.

CUSTOM.

See Weights and Measures.

DAMAGES.

See Building Contract, 3—Chattel Mortgage—Contract, 1, 25—Costs, 2 — Covenant, 2—Defamation, 1, 2 — Ejectment — Fraud and Misrepresentation, 1, 3, 5—Partnership, 1, 3—Pleading, 2—Promissory Notes, 6 —Railway, 6, 8—Trespass, 1—Vendor and Purchaser, 3.

DECEIT.

See Fraud and Misrepresentation—Sale of Goods, 5.

DECLARATION.

See Fraudulent Conveyance.

DEED.

Conveyance of Land—Rectification — Mistake in Description—Excessive Acreage—Insufficiency of Evidence upon which to Adjudge Rectification —New trial: Falk v. Swensen (B. C.), 376.

See Fraudulent Conveyance — Vendor and Purchaser, 12—Will, 2.

DEFAMATION.

1. Newspaper Article Signed by Defendant — Identity of Plaintiff with Person Mentioned in Article—Article Published in Words of Manuscript of Defendant—Proof of—Damages —Costs: Levallee v. Lannic (Alta.), 281.

2. Slander — Proof of Words Spoken—Foreign Language — Interpretation —Innuendo — Amendment — Damages: Reilander v. Bengert (Sask.), 891.

DEFAULT JUDGMENT.

See Judgment, 1-5.

DIRECTORS.

See Company, 5—Vendor and Purchaser, 15.

DISCOVERY.

1. Action to Revoke Probate of Will in Favour of Earlier Document—Leave to Defendant to Photograph Document Produced by Plaintiff—Terms —Costs: Foulds v. Bowler (Man.), 517.

2. Examination of Party — Relevancy of Questions — Trespass — Placarding Hotel with Notice of Contagious Disease: Wedin v. Robertson (Alta.), 72.

DISMISSAL OF ACTION.

See Practice, 2.

DISMISSAL OF SERVANT.

See Master and Servant.

DISORDERLY HOUSE.

See Criminal Law, 4-7.

DISTRIBUTION OF ESTATES.

See Bankruptcy and Insolvency.

DISTRICT COURT.

Jurisdiction — Action to Enforce Mechanic's Lien — Lien Filed before District Court Act Came into Force —Judicature Act—Mechanics' Lien Act — Jurisdiction of Supreme Court of Saskatchewan: Craftsmen v. Hunter (Sask.), 837.

See Mechanics' Liens, 2.

DIVORCE.

Jurisdiction of Supreme Court of British Columbia — Law of England — Introduction — Proclamation of 1858 — Divorce and Matrimonial Causes Act, 1857—Inapplicability from Local Circumstances — Authority of Previous Decisions—Courts of Coordinate Jurisdiction: Watts v. Watts (B.C.), 29.

DOMICILE.

See Attachment of Goods—Judgment, 6, 7.

DOMINION LANDS ACT.

Mortgage of Homestead before Recommendation for Patent — Invalidity —Subsequent Mortgage — Validity — Decree for Sale — Costs: Park v. Long (Sask.), 309.

DURESS.

See Vendor and Purchaser, 1.

EJECTMENT.

Mesne Profits — Improvements — Evidence — Damages — Costs — Set-off: Easton v. Anderson (Alta.), 282.

ELECTION.

See Criminal Law, 3.

ELECTIONS.

See Company, 5—Municipal Elections—Parliamentary Elections.

ESTOPPEL.

See Assessment and Taxes, 3 — Banks and Banking, 2—Chattel Mortgage, 2 Cheque — Company, 5, 8—Husband and Wife, 6—Land Titles Act, 2—Promissory Notes, 4—Sale of Goods, 5.

EVIDENCE.

See Chose in Action, Assignment of, 1 —Contract, 2, 5—Covenant, 2 — Criminal Law, 2-5, 8-11—Deed — Discovery—Ejectment—Fraud and Misrepresentation, 3 — Fraudulent Conveyance — Gift — Husband and Wife, 2, 4, 5, 6—Indian—Mechanics' Liens, 5—Mines and Minerals, 1 — Mortgage, 3 — Municipal Corporations, 1, 5—Partnership, 3—Physician and Surgeon — Principal and Agent, 1, 3, 6, 7, 8, 12, 14—Promissory Notes, 6, 7—Railway, 2, 4—Sale of Goods, 1, 2 ,6, 7—Vendor and Purchaser, 1—Weights and Measures—Will, 2.

EXAMINATION OF PARTIES.

See Discovery, 2.

EXCHANGE OF LANDS.

See Principal and Agent, 1.

EXCHEQUER COURT OF CANADA.

See Ship, 1.

EXECUTION.

1. Fi. fa. Goods — Seizure of Books—Exemptions—Books of Professional Man — Judgment in Action upon Bill of Exchange for Price of Books Seized — Executions Act, secs. 29 (c), 36: Canada Law Book Co. v. A. B. (Man.), 363.

2. Homestead Exemption — Claim by Execution Debtor for Benefit of Mortgagees — Money in Court — Payment out: Purdy v. Colton (Sask.), 820.

3. Sale of Land under — Sheriff's Sale —Auction — Land Knocked down to Highest Bidder—Sheriff Reopening Biddings — Property again Put up and Highest Bidder Declared Purchaser — Refusal to Confirm Second Sale: Re Hind (Sask.), 806.

See Company, 3, 10— Husband and Wife, 4, 5.

EXECUTION CREDITORS.

See Bankruptcy and Insolvency—Company, 10.

EXECUTORS.

Sale of Land—Collusion — Fraud — Account: Munro v. Gillie (B.C.), 253.

See Company, 4—Gift—Land Titles Act, 3, 4.

EXEMPTIONS.

See Execution, 1, 2.

EXPROPRIATION.

See Municipal Corporations, 4—Railway, 6, 7.

EXTRA-PROVINCIAL CORPORATIONS.

See Company, 1, 2.

FALSE REPRESENTATIONS.

See Fraud and Misrepresentation.

FENCES.

See Railway, 2, 3, 4, 8, 9.

FIDUCIARY RELATIONSHIP.

See Banks and Banking, 2.

FIERI FACIAS.

See Execution.

FIRE.

See Contract, 3.

FISHERIES.

See Water and Watercourses, 2.

FIXTURES.

See Company, 8—Trespass, 2.

FORCIBLE ENTRY.

See Trespass, 1.

FORECLOSURE.

See Costs, 4—Mortgage, 1.

FOREIGN BOND.

See Criminal Law, 8.

FOREIGN JUDGMENT.

See Judgment, 6, 7, 10.

FORFEITURE.

See Assessment and Taxes, 3—Vendor and Purchaser, 10, 11.

FORGERY.

See Promissory Notes, 4.

FRAUD AND MISREPRESENTATION.

1. Contract for Sale of Land —Material Misrepresentation by Vendor as to Situation of Land—Reliance of Purchaser on Statement—Action for Purchase Money—Defence — Rescission —False Representation Innocently Made — Affirmance of Contract — Promise to Pay—Damages: Wolfe v. McArthur (Man.), 124.

2. Deceit — Action for — Grounds of Action — Agreement for Lease — Representation as to Time of Getting Possession — Falsity — Concealment of Existing Lease — Demurrer — Amendment — Terms — Costs: Smythe v. Mills (Man.), 557.

3. Purchase of Land—Contract not in Fact Induced by Misrepresentation if Made—Contract Previously Made —Plaintiffs Acquiring an Interest—Deceit—Amendment — Evidence — New Contract—Damages — Contract Resulting in Substantial Profit: Steele v. Pritchard (Man.), 108.

4. Recovery of Money Paid under Contract Induced by Fraud—Cancellation of Contract—Jurisdiction of County Courts: Yasne v. Kronson (Man.), 119.

5. Sale of Hotel as Going Concern — False Representations as to Receipts and Profits — Manufactured Settlement — Action for Deceit—Damages — Measure of—No Loss Shewn — Loss of Estimated Profits not an Element of Damage: Rosen v. Lindsay (Man.), 115.

6. Transfer of Land as Security for Money Lent—Action to Cancel Registration of Transfer—Contract — Condition — Proof of — Breach — Vacating Registration — Terms — Costs: Beere v. Northern Bank (Alta.), 432.

See Building Contract, 1—Executors — Pleading, 4, 5—Practice, 2—Promissory Notes, 1, 2, 7—Sale of Goods, 5—Vendor and Purchaser, 2—Will 2.

FRAUDULENT CONVEYANCE.

Properties Purchased by Trader and Conveyances Made to Wife—Embarking in Hazardous Business — Intent to Defeat Creditors — Declaration — Evidence: Revillon Brothers Limited v. Derome (Alta.), 53.

See Husband and Wife, 4, 5, 6.

GAMING.

See Criminal Law, 6, 7—Trespass, 1.

GARNISHMENT.

See Attachment of Debts.

GAS.

See Municipal Corporations, 5.

GATES

See Railway, 2, 3, 4.

GIFT.

Personal Property — Death of Donor — — Action by Administrator to Recover from Donees — Evidence: McLorg v. Loppe (Sask.), 833.

See Husband and Wife, 6—Municipal Corporations, 7.

GOODWILL.

See Covenant, 2.

GUARANTY.

Letters — Construction — Consideration —Statute of Frauds: H. W. Laird Co. v. Adams (Sask.), 312, 881.

See Contribution.

HABEAS CORPUS.

See Criminal Law, 3, 12 — Judgment Debtor.

HEALTH ACT.

See Constitutional Law, 1—Municipal Corporations, 6.

HIGHWAY.

Obstruction by Building Materials — Injury to Bicyclist — Negligence of Municipal Corporation — Notice of Claim—Letter to Chairman of Board of Works—Sufficiency — Receipt by Clerk — Contributory Negligence — Knowledge of Obstruction — Relief over against Owner of Land Obstructing Highway — Independent Contractor—"Premises:" Mitchell v. City of Winnipeg (Man.), 120.

See Municipal Corporations, 7—Railway, 1.

HOMESTEAD.

See Dominion Lands Act—Execution, 2—Land Titles Act, 1—Promissory Notes, 2.

HOTEL LICENSE.

See Liquor License Act.

HUSBAND AND WIFE.

1. Alimony — Adultery of Wife—Bar to Action: Leib v. Leib (Sask.), 824.

2. Alimony — Interim Alimony — Quantum — Evidence: Diebert v. Diebert (Sask.), 458.

3. Alimony—Wife Leaving Husband — Justification — Cruelty — Evidence to Establish—Countercharge against Wife — Acts of Cruelty Due to Illness: Patrick v. Patrick (Sask.), 470.

4. Business Carried on by Husband in his own Name Alleged to be Property of Wife—Seizure of Plant and Stock of Business under Execution against Husband—Claim by Wife—Interpleader Issue — Evidence — Married Woman's Separate Estate—Statutes: Davison v. Schwartz (Y. T.), 338.

5. Business Carried on by Husband in Name of Wife — Stock in Trade Seized by Execution Creditors of Husband — Married Women's Property Act — Construction — Earnings of Married Woman — Investment in Land — "Property"—Corpus — Profits of Business—Burden of Proof—Evidence—Stock Paid for Largely by Husband's Money — Interpleader Issue: Douglas v. Fraser (Man.), 584.

6. Judgment against Husband—Property Standing in Name of Wife —Fraudulent Scheme to Defraud Husband's Creditors — Allegation that Wife a Trustee for Husband — Parties — Judgment Debtor — Evidence — Gift — Mortgage — Burden of Proof —Pleading—Profits of Business — Earnings of Wife — Principal and Agent — Undisclosed Principal — —Action against Agent—Estoppel—Admission of Evidence — Depositions on Examination of Judgment Debtor — Costs: Clinton v. Sellars (Alta.), 615.

See Attachment of Debts, 1—Divorce—Fraudulent Conveyance — Mechanics' Liens, 5.

ILLEGAL CONSIDERATION.

See Cheque.

ILLEGAL CONTRACT.

See Liquor License Act, 2.

IMMIGRATION.

See Constitutional Law, 2.

IMPROVEMENTS.

See Ejectment—Promissory Notes, 2—Railway, 6.

INDEMNITY.

See Constitutional Law, 3.

INDEPENDENT CONTRACTOR.

See Highway.

INDIAN.

Conviction for Selling Liquor to Indian—Indian Act — Mens Rea—Presumption — Evidence: Rex v. Pickard (Alta.), 797.

See Criminal Law, 12.

INFANT.

See Judgment, 4—Promissory Notes, 6.

INJUNCTION.

See Covenant, 2 — Pleading, 2—Railway, 1—Water and Watercourses, 1.

INNKEEPER.

See Bailment.

INSANITY.

See Lunatic.

INSOLVENCY.

See Bankruptcy and Insolvency.

INSPECTION.

See Mines and Minerals, 1.

INSTALMENTS.

See Mortgage, 1 — Vendor and Purchaser.

INSURANCE.

See Contract, 3.

INTEREST.

See Assessment and Taxes, 2—Banks and Banking, 2—Chattel Mortgage, 1 — Contract, 3 — Mortgage, 1 — Promissory Notes, 3, 5 — Railway, 6—Vendor and Purchaser, 9, 10.

INTERPLEADER.

See Chose in Action, Assignment of, 2 —Husband and Wife, 4, 5.

INTOXICATING LIQUORS.

See Covenant, 3—Criminal Law, 12 — Indian — Liquor License Act.

ISOLATION OF PREMISES.

See Municipal Corporations, 6.

JOINT TENANTS.

See Land Titles Act, 3.

JUDGMENT.

1. Default Judgment—Application to set aside—Affidavit — Merits of Defence — Arrangement between Solicitors — Conditional Leave to Defend — Payment into Court — Costs: Imperial Life Assurance Co. of Canada v. Best (Alta.), 446.

2. Default Judgment — Application to Set aside—Affidavit—Merits of Defence — Necessity for Shewing Grounds of Defence — Delay Explained — Indulgence — Leave to Supplement Affidavit: Stewart v. McMahon (Sask.), 643.

3. Default Judgment — Application to Set aside—Delay — Failure to Explain Satisfactorily — Negotiations for Settlement—Dispute as to Part of Claim—Prejudice by Delay — Refusal to Open up Case: Regina Trading Co. v. Godwin (Sask.), 651.

4. Default Judgment — Application to Set aside — Infant Defendant — Procedure — Rule 88 — Failure to Follow — Setting aside Judgment — Costs: Westaway v. Hamer (Sask.), 473.

5. Default Judgment — Application to Set aside — Merits—Discretion — Appeal—Delay: Anticknap v. City of Regina (Sask.), 163.

6. Foreign Judgment — Action on — Defence — No Jurisdiction in Foreign Court — Domicile of Defendant — Amendment — Statute of Limitations — Payment on Account: Walsh v. Herman (B.C.), 388.

7. Foreign Judgment—Action on — Defence—Want of Jurisdiction in Foreign Court—Residence of Defendant —Judgment in Absentia: McLorg v. Stanning (Man.), 701.

8. Summary Judgment — Order XIV. — Writ of Summons — Special Indorsement — Amendment — Additional Claim — Particulars — Practice: Bank of Montreal v. Thomson (B.C.), 144.

9. Summary Judgment — Rule 103 — Action for Purchase Money of Land —Covenant to Pay — Defence — Title of Plaintiff—Acceptance by Defendants — Terms of Contract: Mansell v. Moore (Sask.), 808.

10. Summary Judgment — Rule 103 — Affidavit Verifying Cause of Action — Action on Foreign Judgment Recovered against Firm — Defence — Partnership — Members of Firm — Dissolution — Carrying on Business —Jurisdiction: Mills v. Magrath (Alta.), 74.

11. Summary Judgment — Rule 103 — Defence — Denial — Unconditional Leave to Defend — Pleading: Prince v. Richards (Sask.), 836.

12. Summary Judgment — Rule 326 — Special Circumstances: White v. Edgar (Alta.), 634.

See Appeal, 1—Banks and Banking, 2 —Building Contract, 2—Company, 8 — Husband and Wife, 6 — Land Titles Act, 4 — Mortgage, 1—Pleading, 4—Vendor and Purchaser, 8.

JUDGMENT DEBTOR.

Order for Commitment—Arrest—Habeas Corpus — Practice — Finding of

Judge after Examination of Debtor on Judgment Summons—Warrant of Commitment — Irregularity — Affidavit: Moore v. Shackleford (Y. T.), 930.

See Husband and Wife, 6.

JURISDICTION.

See Appeal, 2—Arbitration and Award, 2, 3—Attachment of Goods—Criminal Law, 3, 7, 12—District Court—Divorce — Fraud and Misrepresentation, 4 — Judgment, 6, 7, 10—Mechanics' Liens, 2—Railway, 1—Ship, 1—Trial, 1—Writ of Summons.

JURY.

See Criminal Law, 9—Municipal Corporations, 5—Trial.

JUSTICE OF THE PEACE.

See Trespass, 1.

KEEPING COMMON BAWDY HOUSE.

See Criminal Law, 4, 5.

KEEPING COMMON GAMING HOUSE.

See Criminal Law, 6, 7—Trespass, 1.

LACHES.

See Banks and Banking, 2—Covenant, 3—Miners' Liens.

LAND TITLES ACT.

1. Agreement to Mortgage Homestead before Recommendation for Patent — Invalidity — Dominion Act — Alberta Act — Legislative Jurisdiction — Assignment or Transfer—Construction of Statutes: Re Sawyer-Massey Co. and Dennis (Alta.), 272.

2. Caveat — Continuance — Consent — Failure to Obtain Leave of Judge —Lapse — Dominion Act — Saskatchewan Act — Estoppel: Re Tudge Pork Packing Co. (Sask.), 507.

3. Land Vested in Two Executors — Death of One — Power of Survivor to Make Transfer under the Act — Construction of Act — Trustees — Joint Tenants: Re Roueche (Alta.), 278.

4. Transfer by Executor—Powers of Executor — Personal Estate — Partnership Lands — Judgment in Partnership Action: Re Keating and Olsen (Y.T.), 316.

5. Transfer of Land — Certificate of Title—Memorandum Indorsed on — Merger or Extinguishment of Mortgage Assigned to Transferee: Re Riddell (Sask.), 301.

See Mortgage, 3.

LANDLORD AND TENANT.

Lease, Termination of, on Agreement of Tenant to Purchase Demised Premises—Merger — Intention — Onus Action for Rent: Dayman v. Macdonald (Sask.), 296.

See Fraud and Misrepresentation, 2.

LANE.

See Municipal Corporations, 2, 7.

LEASE.

See Landlord and Tenant.

LEGISLATIVE JURISDICTION.

See Land Titles Act, 1.

LIBEL.

See Defamation.

LICENSE.

See Cheque—Liquor License Act.

LIEN.

See Bankruptcy and Insolvency, 2 — Builders and Workmen's Act—Company, 3, 10 — Costs, 3—District Court — Mechanics' Liens— Miners' Liens — Sale of Goods, 5—Vendor and Purchaser, 3 — Weights and Measures.

LIMITATION OF ACTIONS.

See Chose in Action, Assignment of, 1 —Judgment, 6.

LIQUIDATED DAMAGES.

See Contract, 1.

LIQUOR LICENSE ACT.

1. Hotel License — Amount of License Fee in City — Territorial Duty — Payment to Municipality — Construction of Ordinance — Amendment — By-law — Construction: Goode v. City of Edmonton (Alta.), 608.

2. Hotel License — Sale or Barter of Intoxicating Liquors in Wholesale Quantities by Licensee — Loan or Supply of Liquors—Contract for Return of Similar Liquors — Illegality: O'Flynn v. Carson (Sask.), 463.

3. Hotel License granted by Commissioners — Number of Licenses — Householders — Onus of Proof — Interpretation of "Population Actually Resident"—Floating Population — Signatures to Petition: Re Bell Liquor Appeal (B.C.), 250.

LOCAL IMPROVEMENTS.

See Assessment and Taxes, 1.

LOST LUGGAGE.

See Bailment.

LOTTERY.

See Criminal Law, 8.

LUNATIC.

Appointment of Committee — Security and Undertaking — Practice: Re Simpson (B. C.), 36.

MALPRACTICE.

See Physician and Surgeon.

MANDAMUS.

See Mines and Minerals, 2.

MANSLAUGHTER.

See Criminal Law, 9.

MARKET.

See Municipal Corporations, 4.

MARRIAGE.

See Divorce.

MARRIED WOMAN.

See Husband and Wife.

MARRIED WOMEN'S PROPERTY ACTS.

See Husband and Wife.

MASTER AND SERVANT.

1. Dismissal of Servant — Contract of Hiring — Daily Hiring — Wages — Deduction for Days Absent without Leave: Blain v. Britannia Smelting Co. (B.C.), 368.

2. Dismissal of Servant — Justification —Incompetency — Contract of Hiring—Provision Making Master Sole Judge — Exercise of Power of Dismissal for Cause and without Fraud or Caprice — Bonus: Allman v. Yukon Consolidated Gold Fields Co. (Y.T.), 318.

See Miners' Liens—Ship, 1.

MEASURES.

See Weights and Measures.

MECHANICS' LIENS.

1. Actions to Enforce — Consolidation—Parties — Lien-holders — Practice — Alberta Mechanics' Lien Act, secs. 18, 19, 20: Gardner v. Gorman, Ross v. Gorman (Alta.), 630.

2. Actions to Enforce — Jurisdiction of Supreme Court of Alberta — Jurisdiction of District Courts —Amounts Involved — Mechanics' Lien Act — Supreme Court Act—District Courts Act: Freeze v. Carey, McKay v. Carey (Alta.), 287.

3. Costs — "Actual Disbursements" — Counsel Fees: Leibrock v. Adams (Man.), 700.

4. Lien of Sub-contractor — Settlement between Contractor and Owner — Payment in Cash and by Promissory Note — Time at which Lien comes into Existence — Mechanics' Lien Act, sec. 32—Construction: McCauley v. Powell (Alta.), 443.

5. Work Done on Building — Authority of Husband of Owner—Work Reasonably Well Done — Priorities — Mortgagees—Other Lien Holders — Evidence: Gillies v. Gibson (Man.), 243.

See Building Contract, 1, 2—Costs, 3 —District Court.

MEDICAL HEALTH OFFICER.

See Municipal Corporations, 6.

MEDICAL PRACTITIONER.

See Physician and Surgeon.

MENS REA.

See Indian.

MERGER.

See Covenant, 3—Land Titles Act, 5—Landlord and Tenant.

MESNE PROFITS.

See Ejectment.

MINERS' LIENS.

Wages — Claims under Miners' Lien Ordinance for Work done for Layman — Defence by Owner of Mining Lands — Acceptance by Miners of Layman's Cheques — Payment — Delay in Presentment — Laches — Waiver — Practice — Enforcement of Liens — Originating Summons — Certificate of Commencement of Proceedings — Time — Signature of Clerk of Court: Duggan v. Corbett (Y.T.), 693.

MINES AND MINERALS.

1. Trespass Workings — Following Veins — Evidence — Inspection — Conflicting Theories — Determination of Court — Appeal — New Evidence—Reversal of Judgment at Trial: Star Mining Co. v. Byron N. White Co. (B.C.), 147.

2. Yukon Placer Mining Act — Application for Grant by Member of North-West Mounted Police — Refusal of —Orders in Council — Regulations of Department of Interior—Public Policy — Mandamus: Re Maclennan (Y.T.), 209.

See Constitutional Law, 3—Contract, 4 —Miners' Liens.

MISCONDUCT.

See Receiver.

MISREPRESENTATIONS.

See Fraud and Misrepresentation.

MISTAKE.

See Deed—Practice, 5 — Vendor and Purchaser, 10.

MONEY IN COURT.

See Attachment of Debts, 2 — Execution, 2—Payment out of Court.

MORTGAGE.

1. Action on Covenant and for Foreclosure — Summary Judgment under Rule 602 for Amount Due under Covenant—Default in Payment of Instalment — Acceleration Clause—Judgment for whole Mortgage Money — Application to Set aside — Relief upon Payment of Instalment with Interest and Costs—Rule 278—Real Property Act, sec. 117: National Trust Co. v. Campbell (Man.), 754.

2. Default — Mortgagees taking Possession — What Constitutes Possession —Seizure of Crops—Severance — Claim under Seed Grain Chattel Mortgage — Validity: Harrison v. Carberry Elevator Co. (Man.) 535.

3. Transfer of Land Subject to Mortgage—Implied Covenant by Transferee with Mortgagee to Pay Mortgage Money — Land Titles Act, sec. 52—Certificate of Title — Evidence to Shew that Transfer by Way of Security only — Admissibility — Transfer of Bare Legal Estate — Transferee not Liable unless upon a Real Purchase: Short v. Graham (Alta.), 787.

See Costs, 4—Dominion Lands Act — Execution, 2—Fraud and Misrepresentation, 6—Husband and Wife, 6 —Land Titles Act, 1, 5—Mechanics' Liens, 5 — Partnership, 1 — Pleading, 4.

MUNICIPAL CORPORATIONS.

1. By-law — Assize of Bread — Prescribing Weight of Loaf — "Baker's Bread"—City of Regina — Powers Conferred on Town of Regina by Municipal Ordinance before Incorporation of City — Continuance of Powers — Unreasonable By-law—Specific Weight — Shrinkage—Exception in Statute — "Fancy Bread" — Onus: Rex v. Williamson, Rex v. Feihne (Sask.), 501.

2. By-law Closing Lane and Authorizing Transfer to Private Person — By-law Passed in Interest of Transferee — Public Interest — Saving of Expense — Prejudice to Applicant — Consent of Land Owners — Construction of City Ordinance: Re Weir and City of Calgary (Alta.), 45.

3. By-law Regulating Buildings in Town — Distance of Stable from House — Application to Buildings in Existence — Nuisance — Conviction — Quashing: Re Dupuis (Man.), 699.

4. Expropriation of Land for Market Site — Necessity for By-law—Edmonton Charter, Construction of: City of Edmonton v. Macdonald (Alta.), 201.

5. Gas Supplied by, to Citizens — Liability for Injury to Private Property—Dangerous Substance — Negligence — Charge to Jury — Findings — Evidence: Purmal v. Town of Medicine Hat (Alta.), 437.

6. Health Act, R. S. B. C. 1897 ch. 91 —Isolation of Infected Premises by Medical Health Officer—Liability of Municipal Corporation for Expenses of Maintaining Quarantined Premises and Inmates: Taylor v. City of Revelstoke (B.C.), 39.

7. Motion to Quash By-laws—Proof of By-laws — Status of Applicant — Resident of Town — By-law Closing Lane or Highway — Gift or Bonus to Railway Company — By-law Passed in Interest of Company —Prejudice of Ratepayers: Re Loiselle and Town of Red Deer (Alta.), 42.

See Arbitration and Award, 1—Assessment and Taxes—Cheque—Contract, 6—Highway—Liquor License Act — Pleading, 6—Railway, 1—Trespass, 1.

MUNICIPAL ELECTIONS.

Voters' Lists—Qualification of Voters—"Householders" — Construction of Statute—Payment of Taxes—"Exempt"—Road Tax—Man over 50—Civil Servant—Pensioner—Payment of Water Rates: Re Victoria Municipal Voters' Lists (B.C.), 372.

MURDER.

See Criminal Law, 10.

NAVIGABLE RIVER.

See Water and Watercourses, 1, 2.

NAVIGATION.

See Ship—Water and Watercourses, 1.

NECESSARIES.

See Attachment of Debts, 1.

NEGLIGENCE.

See Contract, 3—Highway — Municipal Corporations, 5—Physician and Surgeon—Principal and Agent, 3—Railway, 2, 3, 4, 8, 9—Trial, 1.

NEW TRIAL.

See Criminal Law, 11—Deed.

NEWSPAPER.

See Defamation, 1.

NORTH-WEST MOUNTED POLICE.

See Mines and Minerals, 2.

NOTICE.

See Chose in Action, Assignment of, 1, 2—Company, 5—Sale of Goods, 3—Vendor and Purchaser, 7, 9, 10.

NOTICE OF ACTION.

See Pleading, 6.

NUISANCE.

See Municipal Corporations, 3—Water and Watercourses, 1.

OBSTRUCTION OF WAY.

See Highway.

ORDER IN COUNCIL.

See Mines and Minerals, 2.

ORIGINATING SUMMONS.

See Miners' Liens—Practice, 4.

PARENT AND CHILD.

See Attachment of Debts, 1.

PARLAMENTARY ELECTIONS.

1. Controverted Election Petition — Preliminary Objections — Disposal of—Status of Petitioners — Time Limit for Trial—Incorporation by Reference of Provision of Dominion Act—Rules of Court—Practice or Procedure: Re Morris Provincial Election (Man.), 233.

2. Controverted Election Petition—Time Limit for Trial — Incorporation by Reference of Provision of Dominion Act—Rules of Court — Practice or Procedure: Re Morris Provincial Election (Man.), 132.

PARTICULARS.

See Judgment, 8.

PARTIES.

See Banks and Banking, 2—Company, 4—Costs, 4—Covenant, 2, 3—Husband and Wife, 6—Mechanics' Liens, 1—Practice, 2—Promissory Notes, 1 Railway, 1—Vendor and Purchaser, 3, 11.

PARTNERSHIP.

1. Account — Misconduct of Partner—Damages—Failure to Prove Special Damage—Nominal Damages: Moore v. Macrae (Y.T.), 215.

2. Contract — Mortgage — Covenant—Dispute as to Application of Moneys—Accounts — Reference: Fisher v. Jukes (Man.), 731.

3. Placer Mining Operations — Evidence to Establish Partnership Agreement — Statute of Frauds—Refusal to Carry out Agreement — Damages: Cameron v. Suttles (Y.T.), 686.

See Chose in Action, Assignment of, 1—Judgment, 10 — Land Titles Act, 4—Practice, 1—Receiver — Settlement of Action.

PASSENGER RATES.

See Railway, 5.

PATENT FOR LAND.

See Dominion Lands Act—Land Titles Act, 1.

PAYMENT.

See Judgment, 6—Miners' Liens.

PAYMENT INTO COURT.

See Attachment of Debts, 2—Costs, 5, 6—Judgment, 1.

PAYMENT OUT OF COURT.

1. Money Paid into Court by Defendant in Satisfaction of one Cause of Action — Acceptance by Plaintiffs—Conditional Payment in — Costs—Rule 530 et seq.: Canada Elevator Co. v. Kaminski (Man.), 129.

2. Money Paid in by Defendants to Represent Subject Matter of Action—Plaintiff Unsuccessful at Trial—Appeal—Retention of Money in Court pending Appeal—Insolvency of Defendants: Huggard v. Ontario and Saskatchewan Land Corporation (Sask.), 489.

See Attachment of Debts, 2—Execution, 2.

PEACE OFFICER.

See Criminal Law, 9.

PENALTY.

See Contract, 1 — Criminal Law, 4—Vendor and Purchaser, 9.

PENSIONER.

See Municipal Elections.

PHOTOGRAPH.

See Discovery, 1.

PHYSICIAN AND SURGEON.

Malpractice — Negligence — Evidence: Bennett v. C—— (Man.), 740.

PLACER MINING.

See Mines and Minerals—Partnership, 3.

PLANS.

See Architect.

PLEADING.

1. Statement of Claim — Application to Strike out—Prolixity — Embarrassment—Rules 109, 127: Sack v. Construction Co. (Sask.), 653.

2. Statement of Claim—Prolixity—Irrelevancy — Embarrassment — Rules 306, 326 — Trade Name—User—Invasion—Injunction—Damages: Theo Noel Co. v. Vitæ Ore Co. (Man.), 353.

3. Statement of Claim—Summary Application to Strike out, as Disclosing no Reasonable Cause of Action and as Frivolous and Vexatious—Rule 151—Question of Law Raised as on Demurrer—Construction of Rule: Kew v. Watt (Sask.), 62.

4. Statement of Defence — Denial—Inducement — Admissions — Fraud—Summary Judgment — Mortgage: Lougheed v. Hamilton (Alta.), 204.

5. Statement of Defence — Leave to Amend by Setting up Fraud: Bishopric v. York (Alta.), 206.

6. Statement of Defence — Motion for Leave to Amend Statement of Defence — Withdrawal of Admission—By-law of Municipality — Want of Notice of Action: Gesman v. City of Regina (Sask.), 307.

See Chose in Action, Assignment of, 1—Contract, 3—Fraud and Misrepresentation, 2—Husband and Wife, 6—Judgment, 11 — Payment out of Court—Practice, 3.

POLICE MAGISTRATE.

See Criminal Law, 3, 7, 13.

PRACTICE.

1. Affidavits filed on Interlocutory Application—Scandal—Prolixity — Irrelevancy — Embarrassment—Application to Remove from Files—Partnership Action: York v. Secord (Alta.), 448.

2 Dismissal of Action as Frivolous and Vexatious — Application to Make Party Plaintiff a Company already Defendant — Fraud, Allegation of: Hofins v. Lenora Mount Sicker Copper Mining Co. (B.C.), 156.

3. Ex Parte Order—Right of Judge to Rescind—Appeal—Rules of Court—Order allowing Defendants to Plead other Defences with "Not Guilty by Statute:" Jackson v. Canadian Pacific R. W. Co. (Sask.), 828.

4. Originating Summons—Service out of the Jurisdiction—Order Authorizing Service — Copy Served not a True one—Absence of Prejudice — Rule 538 — Irregularity — Affidavit — Cause of Action—Rule 18: Shore v. Hewson (Sask.), 634.

5. Service of Papers—Garnishing Summons — Mistake in Copy served—Name of Clerk of Court Omitted—Refusal to Set aside Service—Costs: Milner v. Marriott (Alta.), 793.

See Appeal—Attachment of Debts—Attachment of Goods — Contempt of Court — Contribution—Costs—Criminal Law, 1, 14—Discovery—Execution, 2—Fraud and Misrepresentation, 2 — Judgment — Judgment Debtor—Lunatic—Mechanics' Liens, 1—Miners' Liens — Parliamentary Elections—Payment out of Court—Replevin — Settlement of Action—Trial—Writ of Summons.

PREFERENCE.

See Bankruptcy and Insolvency.

PRESUMPTION.

See Indian.

PRINCIPAL AND AGENT.

1. Agents' Commission on Exchange of Lands—Agents Bringing Parties together—Evidence — Conflict — Probabilities — Reversal of Finding of Fact of Trial Judge: Thordarson v. Jones, Thordarson v. Heale (Man.), 106.

2. Agent's Commission on Sale of Goods —Agent bringing Principal and Purchaser together—Sale on New Terms —Quantum Meruit: Milestone Land and Loan Agency Co. v. Lucksinger (Sask.), 497.

3. Agent's Commission on Sale of Goods —Territory—Assistance of Principal in Making Sales — Contract—Evidence—Counterclaim—Negligence of Agent—Injury to Goods—Burden of Proof—Act of God: Mathieson v. Murphy (Sask.), 479.

4. Agent's Commission on Sale of Land —Contract—Sale Brought about by Efforts of Agent: Schuchard v. Drinkle (Sask.), 844.

5 Agent's Commission on Sale of Land — Contract to Pay Commission — Construction — "Completion of the said Sale" — Execution of Binding Agreement—Terms not Carried out: Haffner v. Cordingley (Man.), 764.

6. Agent's Commission on Sale of Land — Contract to Pay Commission — Vendor and Purchaser Brought together by Agent's Procurement—Evidence: Elvin v. Clough (Man.), 762.

7. Agent's Commission on Sale of Land —Dispute as to Employment of Plaintiffs as Agents—Evidence—Purchaser Found by Plaintiffs — Sale Negotiated apart from Plaintiffs—Right to Commission: Duck v. Daniels (B.C.), 770.

8. Agent's Commission on Sale of Land —Employment of Agent—Evidence: Robertson v. Carstens (Man.), 742.

9. Agent's Commission on Sale of Land —Employment of Agent by Vendor to Find Purchaser—Contract—Acceptance of Purchaser Found—Sale not Completed Owing to Fault of Vendor—Right to Payment for Services: Bagshawe v. Rowland (B.C.), 158.

10. Agent's Commission on Sale of Land —Procuring Purchaser Ready and Willing to Carry out the Purchase—Purchaser not Complying with Vendor's Condition as to Deposit with Bank—Deposit Actually Made but so as to be Withdrawable at Purchaser's Option—Refusal of Vendor to Compete—Agent not Entitled to Commission: Yates v. Reser (Sask.), 848.

11. Agent's Commission on Sale of Land —Purchaser Procured by Agent—Finding that Agent not Employed by Defendants; Couse v. Banfield (Man.), 19.

12. Authority of Agent—Scope of—Agent in Charge of Branch Office of Lumber Dealers—Authority to Take Promissory Note of Third Person in Discharge of Debt—Repudiation by Principal—Retention of Note as Collateral Security—Ratification—Evidence—Action for Debt: McDonald v. Lawlor (Sask.), 639.

13. Authority of Agent — Delegation—Receipt Given in Name of Agent's Firm, Signed by Clerk—Statute of Frauds — Vendor and Purchaser—Contract for Sale of Land—Specific Performance: Stevenson v. Smith (B.C.), 161.

14. Sale of Goods to Agent—Liability of Principal for Price—Evidence—Inference from Undisputed Facts — Burden of Proof—Appeal—Reversal of Judgment: Gordon v. Leary (Man.), 533.

See Cheque—Company, 1—Husband and Wife, 6—Mechanics' Liens, 5—Vendor and Purchaser, 4, 13, 15.

PRINCIPAL AND SURETY.

See Contribution—Guaranty.

PRIVILEGE.

See Criminal Law, 10.

PRODUCTION OF DOCUMENTS.

See Contempt of Court.

PROHIBITION.

See Arbitration and Award, 1.

PROMISSORY NOTES.

1. Action on — Defence — Fraud, Misrepresentation, and Concealment of Payees—Indorsement by Payees to Bank as Collateral Security for Debt — Absence of Consideration—Notice of Defective Title — Agreement — Pre-existing Debt not Payable at Time of Transfer of Notes —Company—Subscription for Shares Obtained by Fraud—Repudiation—Action on Notes Given for Price of Shares Commenced before Winding-up—Third Party Proceeding—Notice after Commencement of Winding-up: Canadian Bank of Commerce v. Wait (Alta.), 255.

2. Consideration—Sale of Improvements on Land and Interest in Business—Contract — Construction — Homesteader's Interest—Fraud and Misrepresentation: Ward v. Logan, Logan v. Ward (Alta.), 198.

3. Failure of Consideration — Purchase Price of Horse—Division into Shares —Necessary Number of Subscribers not Obtained — Non-fulfilment of Agreement — Transferee of Note—Holder in Due Course — Interest Overdue at Time of Transfer—Notice of Defects in Transferor's Title —Suspicious Circumstances: Peters v. Perras (Alta.), 193.

4. Forged Indorsement — Action against Ostensible Indorser—Proof of Forgery—Estoppel by Conduct—Previous Action on Forged Indorsement Undefended — Representation of Genuineness of Indorsement: Simon v. Sinclair (Man.), 710.

5. Instrument in Form of Note with Additional Provisions—Interest—Accelerating Clause—Waiver of Presentment, etc.—Holder in Due Course: Davis v. Butler (Man.), 85.

6. Price of Machine—Failure of Consideration—Evidence — Corroboration —Infant—Sale of Machine to—Retention of Machine after Majority—Ratification of Contract — Amendment — Costs — Counterclaim — Damages: Great West Implement Co. v. Grams (Alta.), 190.

7. Purchase Price of Horse—Warranty —False Statement—Repudiation of Sale — Negotiation of Note—Knowledge by Indorsee of Facts—Holders in Due Course—Onus—Fraud: Willoughby v. Conover (Man.), 87.

See Banks and Banking — Chattel Mortgage, 2—Company, 1, 3, 6, 8—Contribution—Mechanics' Liens, 4—Principal and Agent, 12—Sale of Goods, 3.

PROSTITUTION.

See Criminal Law, 4, 5.

PUBLIC HEALTH.

See Constitutional Law, 1—Municipal Corporations, 6.

PUBLIC POLICY.

See Covenant, 3—Mines and Minerals, 2.

QUALIFICATION OF VOTERS.

See Municipal Elections.

QUANTUM MERUIT.

See Contract, 3—Principal and Agent, 2.

QUARANTINE.

See Municipal Corporations, 6.

RAILWAY.

1. Agreement with Municipality — Confirmation by Statute—By-law—Permission to Alter Grade of Streets and Construct Subway — Injury to Land Fronting on Streets—Injunction—Construction of Agreement—Work Done in Accordance with Agreement—Order of Board of Railway Commissioners—Jurisdiction—Parties—Crown—Judgment on Motion for Interim Injunction — Confirmation on Appeal—Judge at Trial not Bound by: Fraser v. Canadian Pacific R. W. Co. (Man.), 734.

2. Animals Killed on Track—Dominion Railway Act, 1903, sec. 237—Animals "at Large" through Negligence of Owner—Evidence—"Otherwise:" Murray v. Canadian Pacific R. W. Co. (Sask.), 50.

3. Animals Killed on Track—Dominion Railway Act, 1903, secs. 199, 237, 239, 294—Defect in Gate — Knowledge—Escape of Animals from Adjoining Land—Liability of Railway Company: Clayton v. Canadian Northern R. W. Co. (Man.), 721.

4. Animals Killed on Track—Dominion Railway Act, R. S. C. 1906 c. 27, sec. 254, sub-sec. 4—Obligation to Fence — "Locality" — Interpretation — Onus: Cortese v. Canadian Pacific R. W. Co. (B.C.), 392.

5. Contract for Special Passenger Rates for Delegates to Convention — Breach — Validity of Contract — Standard Passenger Tariff not Filed and Approved—Railway Act—Construction — Recovery of Amount Overpaid. Grand Lodge of Knights of Pythias v. Great Northern R. W. Co. (B.C.), 425.

6. Expropriation of Land — Compensation to Landowner — Arbitration and Award — Railway Act—Appeal from Award — Principle of Decision — Value of Land for Business Purposes — Percentage Deductions — Track Facilities — Extra Haulage — Contingent Damages—Improvements — Interest: Re Canadian Northern R. W. Co and Robinson (Man.), 593.

7. Expropriation of Land — Obstruction of Water Supply from Spring—Compensation for — Award — Absence of Water Record — Water Clauses Consolidation Act. Re Vancouver, Victoria, and Eastern R. W. Co. and Milsted (B.C.), 384.

8. Fences — Failure to Erect — Land Severed by Railway — Cattle Trespassing and Injuring Property—Liability of Railway Company — Rest of Land not Surrounded by Lawful Fence — Fence Ordinance—Railway Act, R. S. C. ch. 37, sec. 254—Damages: Winterburn Farm Co. v. Edmonton, Yukon, and Pacific R. W. Co. (Alta.), 801.

9. Injury to Person at Railway Crossing —Crossing not at Highway and not Sanctioned by Board of Railway Commissioners — Non-compliance with secs. 242 and 243 of Railway Act—Fences at Crossing—Invitation to Public — Condition of Crossing —Danger — Common Law Negligence: Bird v. Canadian Pacific R. W. Co. (Sask.), 868.

See Municipal Corporations, 7.

RAILWAY COMMISSIONERS.

See Railway, 1. 9.

RAPE.

See Criminal Law, 11.

RATES.

See Railway, 5.

RATIFICATION.

See Principal and Agent, 12—Promissory Notes, 6.

REAL PROPERTY ACT.

See Assessment and Taxes, 3—Mortgage, 1.

RECEIPT.

See Principal and Agent, 13.

RECEIVER.

Partnership Action — Appointment of Defendant, the Active Partner, as Manager and Receiver—Misconduct —Salary: Kelly v. Kelly (Man.), 542.

See Bankruptcy and Insolvency, 1.

RECOVERY OF LAND.

See Ejectment.

RECTIFICATION.

See Deed.

REDEMPTION.

See Assessment and Taxes, 3.

REFEREE IN CHAMBERS.

See Trial, 1.

REFERENCE.

See Company, 4—Partnership, 2.

REGISTRY LAWS.

See Land Titles Act.

RELIEF AGAINST FORFEITURE.

See Vendor and Purchaser, 10.

RELIEF OVER.

See Highway.

REPLEVIN.

Præcipe Order—Sheriff Acting on—Delivery of Goods to Plaintiff—Order Set aside — Redelivery—Protection to Sheriff—Costs: Schatsky v. Bateman (Man.), 526.

RESCISSION.

See Fraud and Misrepresentation—Sale of Goods—Vendor and Purchaser.

RESTRAINT OF TRADE.

See Covenant — Criminal Law, 2 — Vendor and Purchaser, 12.

REVENUE.

See Cheque.

RIPARIAN OWNERS.

See Water and Watercourses, 1.

RIVERS AND STREAMS.

See Water and Watercourses, 1.

ROAD TAX.

See Municipal Elections.

RULES OF COURT.

See Parliamentary Elections—Pleading —Practice, 3.

SALARY.

See Receiver.

SALE OF GOODS.

1. Action for Price—Contract—Unascertained Goods — Sale by Description —Sales of Goods Act — Deduction from Price — Goods not of Description Ordered — Evidence — Acceptance and Resale of Goods—Quality —Waiver — Time for Objection—Condition Precedent—Order of Judge Permitting Sale — Counterclaim—Delay in Shipping—Breach of Warranty — Costs: Burlington Canning Co. v. Campbell (Man.), 544.

2 Action for Price — Goods to Supply Place of Others Alleged to be Found Defective — Burden of Proof —Evidence—Neglect to follow Directions for Using: Miniota Lumber and Grain Co. v. Foley (Sask.), 482.

3. Action on Promissory Notes Given for Price—Defects in Goods—Notice — Counterclaim for Breach of Warranty — Failure to Return Goods—Continued Possession — Delay — Acceptance — Repudiation—Rescission of Contract: New Hamburg Manufacturing Co. v. Weisbrod (Sask.), 894.

4. Contract — Vendor Re-taking Possession — Action for Balance of Price —Rescission—Credit Given for Value of Goods: Hopkins v. Danroth (Sask.), 303.

5. Deceit — Breach of Warranty of Title — Incumbrance on Goods — Retaking by Person Entitled to Lien —— Sale in the Ordinary Course of Business — Estoppel — Implied Authority—Fair Value—Misrepresentation as to Ownership—Costs: Brett v. Foorsen (Man.), 13.

6. Specific Article — Sale by Description — Reliance on Vendor's Representations — Proof of Falsity — Implied Warranty — Action for Price —Evidence — Credibility of Witnesses: Bannerman v. Barlow (Sask.), 859.

7. Title — Chattel Mortgage — Bill of Sale — Description — Evidence — Trover: Fuller v. Hunker Mercantile Co. (Y.T.), 80.

See Principal and Agent, 2, 3, 14.

SALE OF HOTEL.

See Fraud and Misrepresentation, 5.

SALE OF LAND.

See Cheque — Costs, 2—Covenant, 3—Execution, 3—Executors — Fraud and Misrepresentation, 1, 3—Judgment, 9—Principal and Agent, 4—13—Vendor and Purchaser.

SCALE OF COSTS.

See Costs, 5, 6.

SCHOOL TAXES.

See Assessment and Taxes, 2.

SEAL.

See Company, 8.

SECRET TRUST.

See Company, 4.

SECURITY.

See Lunatic.

SENTENCE.

See Criminal Law, 13.

SEPARATE ESTATE.

See Husband and Wife, 4, 5.

SERVICE OF PAPERS.

See Practice, 5.

SERVICE OUT OF JURISDICTION.

See Practice, 4—Writ of Summons.

SET-OFF.

See Ejectment.

SETTLEMENT.

See Banks and Banking, 2—Cheque

SETTLEMENT OF ACTION.

Partnership — Authority — Solicitors—Motion to Enforce Compromise — Validity — Issue: Canadian Bank of Commerce v. Donoghue (Y.T.), 511.

SHARES.

See Company, 3-9—Promissory Notes, 1.

SHERIFF.

See Attachment of Debts, 2—Bankruptcy and Insolvency, 2—Company, 3—Replevin.

SHERIFF'S SALE.

See Execution, 3.

SHIP.

1. Claim for Wages by Cook—Jurisdiction of Exchequer Court—Amount under £50—Merchant Shipping Act, 1894, sec. 165—Exception — Contract — Whole Voyage—Cook Left behind at Intermediate Port because of Illness — Proper Sanction—Voyage Terminating in United Kingdom — Sec. 166 (1) of Act—Discharge — Written Consent of Master — Ill-usage—Certificate — Termination of Engagement — Costs: Cable v. Socotra (B.C. Adm.), 25.

2. Collision—Investigation under Canada Shipping Act—Rules of Navigation—Signals—Findings as to Fault—Consequences: The "Tartar" v. The "Charmer" (B.C.), 417.

See Water and Watercourses, 2.

SLANDER.

See Defamation.

SOLICITOR.

See Execution, 1—Judgment, 1—Settlement of Action.

SPECIFIC PERFORMANCE.

See Assessment and Taxes, 3—Costs, 2—Covenant, 3—Principal and Agent, 13—Vendor and Purchaser.

STATEMENT OF CLAIM.

See Pleading.

STATUTE OF FRAUDS.

See Guaranty — Partnership, 3—Principal and Agent, 13.

STATUTE OF LIMITATIONS.

See Judgment, 6.

STATUTES.

See Assessment and Taxes, 4—Bankruptcy and Insolvency, 2—Company, 1, 2, 10—Constitutional Law—Husband and Wife, 4—Land Titles Act—Liquor License Act — Mechanics' Lien Act—Miners' Liens—Mines and Minerals—Municipal Corporations—Municipal Elections—Parliamentary Elections—Railway, 1—Vendor and Purchaser, 9.

STAY OF PROCEEDINGS.

See Attachment of Goods.

STREAMS.

See Water and Watercourses, 1.

SUMMARY CONVICTION.

See Criminal Law.

SUMMARY JUDGMENT.

See Judgment, 8-12 — Mortgage, 1 — Pleading, 4.

SUMMARY TRIAL.

See Criminal Law, 3, 7, 13.

SUPREME COURT OF ALBERTA.

See Mechanics' Liens, 2.

SUPREME COURT OF BRITISH COLUMBIA.

See Appeal, 1, 2—Divorce.

SUPREME COURT OF SASKATCHEWAN.

See District Court.

SURETY.

See Contribution.

SURVIVORSHIP.

See Land Titles Act, 3.

TAX SALE.

See Assessment and Taxes, 3, 4.

TAXATION OF COSTS.

See Costs, 7.

TAXES.

See Assessment and Taxes—Municipal Elections.

TENDER.

See Assessment and Taxes, 3—Contract, 6—Costs, 6—Vendor and Purchaser, 10, 12.

THEFT.

See Criminal Law, 13.

THIRD PARTIES.

See Promissory Notes, 1.

THRESHERS' LIEN ORDINANCE.

See Weights and Measures.

TIMBER.

See Constitutional Law, 3.

TIME.

See Appeal, 1, 2 — Arbitration and Award, 1, 2—Assessment and Taxes, 2, 4—Attachment of Goods—Bill of Sale — Building Contract — Chattel Mortgage, 2—Company, 8—Costs, 3—Covenant, 2—Criminal Law, 1 — Fraud and Misrepresentation, 2 — Mechanics' Liens, 4—Miners' Liens—Parliamentary Elections—Sale of Goods, 1—Vendor and Purchaser, 9, 10.

TITLE TO LAND.

See Judgment, 9—Trespass, 2.

TORT.

See Attachment of Goods.

TRADE COMBINATION.

See Criminal Law, 2.

TRADE NAME.

See Pleading, 2.

TRANSFER OF LAND.

See Covenant, 3—Fraud and Misrepresentation, 6—Land Titles Act, 5—Mortgage, 3.

TRANSFER OF SHARES.

See Company, 7.

TRESPASS.

1. Forcible Entry of Premises by Police Officer—Gambling House—By-law of City — Justification — Absence of Warrant—Criminal Code, sec. 575—Gambling Instruments Destroyed by Justices' Order—Moneys Taken from Till—Damages—Nominal Damages: Win Gat v. Johnson (Sask.), 637.
2. Removal of Buildings—Action to Recover Value—Title to Land—Proof of — Ownership of Buildings — Annexation to Freehold—Equitable Interest — Repairs: Mills v. Bryce (Man.), 738.

See Discovery, 2—Mines and Minerals, 1—Water and Watercourses, 1.

TRIAL.

Order for Trial by Jury—Jurisdiction of Referee in Chambers — Action for Negligence: Cameron v. Winnipeg Electric R. W. Co. (Man.), 698.

See Costs, 7 — Criminal Law — Parliamentary Elections—Railway 1.

TROVER.

See Sale of Goods, 7.

TRUSTS AND TRUSTEES.

See Assessment and Taxes, 3 — Banks and Banking, 2—Husband and Wife, 6—Land Titles Act, 3.

UNDERTAKING.

See Lunatic.

UNDUE INFLUENCE.

See Will, 2.

VAGRANT.

See Criminal Law, 14.

VANCOUVER ISLAND SETTLERS' RIGHTS ACT.

See Constitutional Law, 3.

VENDOR AND PURCHASER.

1. Contract for Sale of Land — Action for Specific Performance — Duress —Evidence: Tirschmann v. Schultz (Man.), 525.

2. Contract for Sale of Land — Action by Vendor for Specific Performance —Defence of Fraud — Misrepresentations as to Quality and Value of Land — Caveat Emptor: Hannah v. Graham (Man.), 554.

3. Contract for Sale of Land—Crop-payments — Default — Attempted Cancellation by Vendor — Assignment of Contract by Purchaser — Resale by Vendor — Rights of Assignee of Purchaser—Specific Performance—Delay — Damages — Costs — Defendants Severing — Lien: Crawford v. Patterson (Alta.), 183.

4. Contract for Sale of Land — Incomplete Contract — Offer — Qualified Acceptance — Agent — Representation of Authority: Williams v. Hamilton (B.C.), 40.

5. Contract for Sale of Land—Payment of Purchase Money by Instalments—Default — Acceleration Clause — Action to Recover whole Purchase Money or in Default for Cancellation — Default by Vendor — Purchaser relieved on Terms: Vosper v. Aubert (Man.), 758.

6. Contract for Sale of Land — Payment of Purchase Money by Instalments — Default — Assignment of Contract by Purchasers — Payment by Assignee — Agreement as to Reassignment — Consent of Vendors—Refusal to Give—Breach of Condition — Specific Performance: Halliday v. Vincent (Man.), 7.

7. Contract for Sale of Land — Payment of Purchase Money by Instalments — Default — Notice — Rescission—Construction of Contract — Specific Performance: Paget v. Bennett (Man.), 11.

8. Contract for Sale of Land — Payment of Purchase Money by Instalments—Default — Remedy — Judgment — Sale of Land: Woodward v. Kosowan (Alta.), 632.

9. Contract for Sale of Land — Payment of Purchase Money by Instalments—Default — Rescission — Time of Essence of Contract — Intention of Parties — Penalty — Forfeiture—Relief against — Provision of Judicature Act—Retroactivity — Interest — Notice of Cancellation — Wording of Contract — Blank in Printed Form — Counterclaim — Return of Moneys Paid: Steele v. McCarthy (Sask.), 902.

10. Contract for Sale of Land—Payment of Purchase Money by Instalments — Interest — Construction of Contract — Default — Notice of Cancellation — Waiver — Tender — Demand of Payment — Place of Mailing — Mistake in Date of Contract—Time of Essence of Contract — Forfeiture — Relief against — Judicature Act: Great West Lumber Co. v. Wilkins (Alta.), 166.

11. Contract for Sale of Land—Payment of Purchase Money by Instalments —Resale by Purchaser — Default in Payment of Instalment — Action by Vendor against Purchaser and Subpurchaser — Forfeiture — Recovery of Instalment — Cancellation of Contract — Parties — Leave to Sub-purchaser to Apply: Schurman v. Ewing and Moore (Alta.), 610.

12. Contract for Sale of Land—Purchaser Ready to Complete Payment — Vendor Refusing to Execute Deed unless it Contained Restrictive Clause — Restraint on Alienation — Invalidity — Dispensing with Tender — Assignment of Contract — Specific Performance: Maloney v. Whitlock (Sask.), 460.

13. Contract for Sale of Land—Want of Authority of Agent of Vendor — Incomplete Contract — Correspondence — Specific Performance Refused: Jull v. Rasbach (B.C.), 404.

14. Contract for Sale of Land—Vendor Declining to Convey—Action for Specific Performance — Defence — Caveat — Incumbrance Created by Purchaser: White v. Edgar (Alta.), 800.

15. Sale of Land by Company — Agreement of Managing Director to Repurchase at Specified Price — Inducement to Purchase — Principal and Agent — Undisclosed Principal — Personal Liability of Agent — Specific Performance: Litchfield v. Saskatchewan and Battle River Land and Development Co. (Sask.), 475.

See Contract, 4—Costs, 2—Covenant, 3 —Fraud and Misrepresentation, 1, 3 —Judgment, 9—Landlord and Tenant—Principal and Agent, 4-13.

VOTERS' LISTS.

See Municipal Elections.

WAGES.

See Master and Servant—Miners' Liens —Ship, 1.

WAIVER.

See Arbitration and Award, 2—Assessment and Taxes, 3 — Banks and

Banking, 1—Building Contract, 1—Company, 3—Covenant, 3—Miners' Liens—Promissory Notes, 5—Sale of Goods, 1—Vendor and Purchaser, 10.

WARRANT FOR ARREST.

See Criminal Law, 9.

WARRANT OF COMMITMENT.

See Criminal Law, 12—Judgment Debtor.

WARRANTY.

See Promissory Notes, 7—Sale of Goods, 1, 3, 5, 6.

WATER AND WATERCOURSES.

1. Lands Bordering on Navigable River—Rights of Riparian Owner — Removal of Sand from Bed of River—Effect of—Nuisance—Ownership of Soil in Bed of River—Trespass — Injunction — Rights of Navigation: Patton v. Pioneer Navigation and Sand Co. (Man.), 744.
2. Tidal and Navigable River—Fisherman — Licensee under Fisheries Act — Destruction of Net by Passing Steamer — Obstruction of Channel—Rights of Navigation — Failure to Establish Wanton Act: McInsley v. Gilley (B.C.), 22.

See Railway, 7.

WATER CLAUSES CONSOLIDATION ACT.

See Appeal, 2—Railway, 7.

WATER RATES.

See Municipal Elections.

WAY.

See Highway—Municipal Corporations, 2, 7—Railway, 1.

WEIGHTS AND MEASURES.

Threshers' Lien Ordinance — Computation of Amount of Grain Threshed — Automatic Weigher — Evidence — Burden of Proof — Custom: Gilby v. Johnston (Sask.), 493.

See Municipal Corporations, 1.

WILL.

1. Execution — Attestation — Subscription of Witnesses to Affidavit instead of to Attestation Clause — Validity: Re Harvie (Man.), 103.
2. Undue Influence — Fraud — Want of Testamentary Capacity—Action to Set aside—Evidence — Bill of Sale —Conveyances of Land — Transfer of Business — Absence of Consideration: Tellier v. Schilemans (Man.), 229.

See Discovery, 1.

WINDING-UP.

See Company, 8, 9, 10 — Promissory Notes, 1.

WITNESS FEES.

See Costs, 1.

WITNESSES.

See Sale of Goods, 6—Will, 1.

WORDS.

"Actual Disbursements" — See Mechanics' Liens, 3.
"At Large"—See Railway, 2.
"Baker's Bread"—See Municipal Corporations, 1.
"By the Day"—See Builders and Workmen's Act.
"Completion of the said Sale" — See Principal and Agent, 5.
"Debt or Liquidated Demand" — See Attachment of Debts, 1.
"Decision"—See Appeal, 2.
"Estimate or Certificate" — See Contract, 6.
"Exempt"—See Municipal Elections.
"Fancy Bread" — See Municipal Corporations, 1.
"Gain"—See Criminal Law, 6.
"Householders"—See Municipal Elections.
"Locality"—See Railway, 4.
"Machine"—See Contract, 3.
"Otherwise" — See Railway, 2.
"Population Actually Resident" — See Liquor License Act, 3.
"Premises"—See Highway.
"Property"—See Husband and Wife, 5.
"Recovered"—See Costs, 6.
"Undue"—See Criminal Law, 2.
"Workmen"—See Builders and Workmen's Act.

WORK AND LABOUR.

See Builders and Workmen's Act — Building Contract—Contract, 6 — Mechanics' Liens—Miners' Liens—Railway, 1.

WORKMEN'S COMPENSATION ACT.

See Arbitration and Award, 3.

WRIT OF SUMMONS.

Service out of Jurisdiction—Action for Price of Land Sold—Contract—Performance — Place of Payment — Breach within the Jurisdiction — Previous Breach without the Jurisdiction: Saskatchewan and Battle River Land and Development Co. v. Hunter (Sask.), 298.

See Judgment, 8.

WRONGFUL DISMISSAL.

See Master and Servant.

YUKON PLACER MINING ACT.

See Mines and Minerals, 2.

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